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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TECHNICAL SERGEANT DONALD J. DRESEN,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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87 pp.

QUESTION PRESENTED

Whether it was improper for the 8th Air Force Legal Office, given their active involvement in attempting to overturn the Court of Appeals for the Armed Forces' Decision ordering a new action, to have provided the legal advice to the 8th Air Force Commander, the convening authority, regarding the disposition of petitioner's case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 6

CONCLUSION 14

APPENDIX A
(Opinion of the United States Court of Appeals for the Armed Forces, dated 15 September 1997) 1a

APPENDIX B
(Opinion of the United States Air Force Court of Criminal Appeals, dated 30 July 1996) 10a

APPENDIX C
(Opinion of the United States Court of Appeals for the Armed Forces, dated 27 September 1995) ... 17a

APPENDIX D
(Opinion of the United States Air Force Court of Criminal Appeals, dated 12 May 1995) 19a

APPENDIX E
(Opinion of the United States Court of Military Appeals, dated 22 September 1994) 21a

APPENDIX F
(Opinion of the United States Air Force Court of Military Review, dated 22 March 1993) 33a

TABLE OF AUTHORITIES

Page

Military Cases:

United States v. Brown, 17 M.J. 987 (ACMR 1984) 8, 9

United States v. Coulter, 3 USCMA 657, 14 CMR 75(1954) 7, 12

United States v. Dresen, __ M.J. __ (No. 93–0949, September 15, 1997) 1, 6

United States v. Dresen, ACM 29249 (AFCMR, July 30, 1996) 1, 6

United States v. Dresen, 43 M.J. 372 (1995) 1, 4

United States v. Dresen, ACM 29249 (A.F.Ct.Crim.App., May 12, 1995) 1, 3

United States v. Dresen, 40 M.J. 462 (CMA 1994) 1, 3, 4

United States v. Dresen, 36 M.J. 1103 (AFCMR 1993) 1, 3

United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952) 7, 12

United States v. Graham, 17 C.M.R. 889 (AFBR 1954) 9

United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954) 9

United States v. Holt, 38 M.J. 682 (AFCMR 1993) 11

United States v. Leal, 44 M.J. 235 (1996) 8, 12

United States v. McCormick 34 M.J. 752 (NMCMR 1992) 8, 11, 12

United States v. Rice, 33 M.J. 451 (CMA 1991) 11

United States v. Waddell, ACM S29061
(A.F.Ct.Crim.App., February 13, 1996) 11

Manual for Courts-Martial, United States, 1984 (199S ed.):

Rule for Courts-Martial (R.C.M.) 1106(b) 11

Federal Statutes:

10 U.S.C.A. § 867(a) 1

28 U.S.C.A. § 1259 (3) 1

10 U.S.C. § 806 .....8, 10, 13, 14

10 U.S.C. §§ 890, 891, and 912a 2

The petitioner, Technical Sergeant Donald J. Dresen, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 15, 1997.

OPINIONS BELOW

Petitioner's case had been heard numerous times below. The most recent order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Dresen*, __ M.J. __ (No. 93–0949, September 15, 1997), is located at Appendix A. The latest opinion of the United States Air Force Court of Criminal Appeals (No. ACM 29249, July 30, 1996) is unpublished and is located at Appendix B. The Court of Appeals for the Armed Forces' summary disposition setting aside the Air Force Court of Criminal Appeals' decision, reported at 43 M.J. 372 (1995), is at Appendix C. The unpublished Air Force Court of Criminal Appeals' decision (No. ACM 29249, May 12, 1995) before that is at Appendix D. The first opinion of the Court of Appeals for the Armed Forces, then the Court of Military Appeals, reported at 40 M.J. 462 (C.M.A. 1994), is at Appendix E. The Air Force Court of Criminal Appeals', then the Air Force Court of Military Review's, first opinion was reported at 36 M.J. 1103 (AFCMR 1993), and is at Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Procedural History:

On 15,16,17,22 and 23 January 1991, petitioner was tried by a general court-martial at Carswell Air Force Base, Texas. He was convicted, contrary to his pleas, of one specification of disobeying a lawful order of a superior commissioned officer, one specification of disobeying a lawful order of a non-commissioned officer, and wrongfully using marijuana on divers occasions, in violation of Articles 90, 91, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 891, and 912a, respectively.

He was sentenced to a bad conduct discharge, confinement for 12 months, forfeiture of $500.00 pay per month for 6 months, and reduction to the grade of airman basic (E–l). On 17 April 1991, pursuant to the advice from his staff judge advocate, the convening authority, 8th Air Force Commander Lieutenant General Shuler, Jr., dismissed Charge I and its specification due to an improper referral, approved the finding of guilt to Charge III and its specification, and approved a bad conduct discharge, confinement for 10 months, forfeiture of $500.00 pay per month for 6 months, and reduction to the grade of airman basic (E–1).

In its initial review on 29 March 1993, the then Air Force Court of Military Review affirmed the finding but reassessed the sentence because the Court was uncomfortable that the convening authority, after disapproving a charge that

constituted 5 years of the maximum 7 years in confinement petitioner was subject to, could meaningfully determine what the sentence would have been absent Charge I and its specification. Although "confident" that a servicemember with 19½ years of service and no prior disciplinary problems would have received some jail time from enlisted and officer members for divers uses of marijuana, the Court only approved as an appropriate sentence a bad conduct discharge and reduction to the grade of airman basic (E–l). *United States v. Dresen,* 36 MJ 1103 (AFCMR 1993) (Appendix F) . By that time, the petitioner had already served his 10 months in jail.

On the first review to the Court of Appeals for the Armed Forces, then the Court of Military Appeals, (22 September 1994) (Appendix E), that Court specifically found that the Air Force Court had not abused its discretion by not ordering a rehearing on sentence. However, the Court set aside the decision, finding that the record of trial should have been returned to the convening authority because petitioner received inadequate representation, which was prejudicial, when his defense counsel had asked the convening authority to approve the bad conduct discharge, a request contrary to the express desires of the petitioner. *United States v. Dresen,* 40 MJ 462 (CMA 1994).[1] The Court ordered petitioner's record of trial returned to "the Judge Advocate General of the Air Force for referral to a new convening authority for a recommendation by the Air Force staff judge advocate and action by the convening authority . . ." *Id,* at 465. Petitioner's record of trial was returned to the 8th Air Force commander (the convening authority), at that time Lieutenant General

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[1]The Air Force Court had found error on the part of defense counsel requesting approval of a bad conduct discharge, contrary to appellant's express wish, but had found no prejudice.

Stephen B. Croker, for a second submission of clemency matters and a second staff judge advocate recommendation. On 16 February 1995, the convening authority approved the same sentence as had been approved in 1991: a bad conduct discharge, confinement for 10 months, forfeiture of $500.00 pay per month for 6 months, and reduction to the grade of airman basic (E–1).

On 12 May 1995, in its second review, the now named Air Force Court of Criminal Appeals approved the findings and the sentence as "correct in law and fact." (Appendix D). No further or new issues were raised by petitioner's counsel prior to the Air Force Court's 12 May 1995 decision.

For the second appeal to the Court of Appeals for the Armed Forces, then the Court of Military Appeals, Captain Michael McIntyre was assigned as petitioner's appellate defense counsel due to the permanent change of station (PCS) of his prior appellate defense counsel. On 5 July 1995, petitioner raised one assignment of error in his Supplement to his Petition for a Grant of Review. On 10 July 1995 the Government entered its "general opposition" and did not file a specific reply. On 27 September 1995, the Court of Appeals for the Armed Forces again set aside the decision of the Air Force Court of Criminal Appeals, finding that the staff judge advocate had erred in advising the convening authority that the maximum sentence he could approve was the sentence originally approved by the convening authority in 1991 (a bad conduct discharge, 10 months confinement, forfeitures of $500.00 pay per month for 6 months, reduction to the rank of airman basic) and not the sentence ultimately approved by the Air Force Court in its 1993 decision (a bad conduct discharge and reduction to the rank of airman basic). The Court of Appeals for the Armed Forces ordered that petitioner's record of trial be returned to the "Judge Advocate General of the Air Force for resubmission to the convening authority for a new

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staff judge advocate's recommendation and action." (Appendix C). Appellee did not file a Petition for Reconsideration with the Court within 10 days of its decision, as required by Rule 31 of the Court of Appeals for the Armed Forces Rules of Practice and Procedure. In accordance with that Court's decision, on 20 October 1995, the petitioner's record of trial was returned to the 8th Air Force commander by The Air Force Judge Advocate General for "resubmission" to the convening authority.

During the week of 17 December 1995, the Air Force Appellate Defense Division (also known as "AFLSA/JAJA"), (through petitioner's counsel) inquired about the status of petitioner's clemency submissions. No new action had been taken by that date. Petitioner had not been appointed any defense counsel to assist him with clemency matters. No explanation was provided as to what 8th Air Force had been doing with petitioner's record of trial from 20 October 1995 to 17 December 1995. The Appellate Defense Division was informed that the 8th Air Force legal office was working with the Appellate Government Division to petition the Court of Appeals for the Armed Forces to reconsider its 27 September 1995 decision. This request was being made despite the fact that The Judge Advocate General of the Air Force had returned petitioner's record of trial on 20 October 1995 in order to comply with the Court of Appeals for the Armed Forces' order. (staff judge advocate recommendation, block 36b). On 27 December 1995, the Government filed a petition for reconsideration, which was denied by the Court of Appeals for the Armed Forces on 25 January 1996.

On 2 April 1996, the 8th Air Force commander, at that time Lieutenant General Phillip Ford, upon the recommendation of Captain Tooker and the staff judge advocate, approved the findings and a sentence to a bad conduct discharge and reduction to the grade of airman first

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class (E–3). Captain Tooker actually wrote the staff judge advocate recommendation and the addendum, recommending to the convening authority that petitioner's bad conduct discharge be approved, although petitioner requested that the bad conduct discharge be disapproved. On 30 July 1996, on review to the Air Force Court of Criminal Appeals for a third time, that Court once again affirmed. (Appendix B).

Appellant then petitioned the Court of Appeals for the Armed Forces again. On 15 September 1997, that Court held that the 8th Air Force legal office was not disqualified from providing legal advice to the convening authority in petitioner's case. (Appendix A).

REASON FOR GRANTING THE WRIT

IT WAS IMPROPER FOR THE 8TH AIR FORCE LEGAL OFFICE, GIVEN THEIR ACTIVE INVOLVEMENT IN ATTEMPTING TO OVERTURN THE COURT OF APPEALS FOR THE ARMED FORCES' DECISION ORDERING A NEW ACTION, TO HAVE PROVIDED THE LEGAL ADVICE TO THE 8TH AIR FORCE COMMANDER, THE CONVENING AUTHORITY, REGARDING THE DISPOSITION OF PETITIONER'S CASE.

As noted, the Air Force Appellate Defense Division was informed in December 1995 that the 8th Air Force legal office was in the process of asking the Appellate Government Division to request reconsideration out of time of the 27 September 1995 decision by the Court of Appeals for the Armed Forces. This fact was confirmed in the staff judge advocate's recommendation. In the recommendation itself, Captain Tooker states that "This office requested, through appellate channels, that the United States Court of Appeals for the Armed Forces reconsider their order." (staff judge

advocate recommendation, block 36b). The staff judge advocate, Colonel Mangin, signed the recommendation and addendum, concurring with the statements made by Captain Tooker. When reconsideration was denied, the 8th Air Force legal office recommended that petitioner's bad conduct discharge be approved.

The Law

As Court of Appeals for the Armed Forces has long stated, an accused's best hope for sentencing relief is with the convening authority. *United States v. Coulter,* 3 USCMA 657, 14 CMR 75, 78 (1954). Thus, an accused has a right to an impartial review of his case for clemency. *United States v. Gordon,* 1 USCMA 255, 2 CMR 161 (1952). ". . . [H]uman behavior is such, that when a person interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter." *Coulter, supra, citing Gordon, supra.* It is of utmost importance to an accused that the post-trial recommendation, upon which the convening authority will base his action on the sentence, be free of any possible suggestion of personal partiality or bias on the part of the reviewer. *Id.* Therefore, it was fundamentally unfair for the 8th Air Force legal office to have been involved in providing advice to the convening authority about petitioner's clemency submissions after they had taken an active, and indeed lead role, in attempting to deny petitioner the opportunity to again submit clemency matters, which had been ordered by The Judge Advocate General of the Air Force, pursuant to the order of the Court of Appeals for the Armed Forces.

Article 6(c), UCMJ, 10 USC § 806(c) states:

> (c) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating

> officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

The language of the article is not considered all inclusive, for the intent behind the rule is clear—an accused is entitled to a fair and impartial post-trial recommendation by a person "free from any **connection** with the controversy." *See United States v. McCormick,* 34 M.J. 752 (NMCMR 1992) (citations omitted, emphasis added); *United States v. Leal,* 44 MJ 235 (1996) ("The essence of post-trial practice is basic fair play."). As the Army Court of Military Review noted in *United States v. Brown,* 17 MJ 987 (ACMR 1984), "[t]he legislative history confirms that this Article (Article 6(c)) was developed to 'secure review by an impartial Air Force judge advocate or legal officer . . .' S.Rep. No. 81–486, 81th Cong., 1st Sess. 9, *reprinted* in Index and Legislative History, Uniform Code of Military Justice 996." Because of their direct involvement as adversaries in the litigation of an issue on appeal in petitioner's case, Captain Tooker and the staff judge advocate became involved in the "controversy" and created the connection that had previously been missing.

The Air Force Court of Criminal Appeals decision

The Air Force Court's most recent decision (30 July 1996)(Appendix B) affirming petitioner's conviction and sentence dismissed this issue by stating that petitioner had cited no authority which disqualifies a staff judge advocate under the circumstances "*sub judice*", and that no member of the 8th Air Force legal office acted in any capacity listed in Article 6(c).

It has long been held that a staff judge advocate, because of his position in the military justice system and because of explicit Congressional intent, may prepare, and must prepare, the post-trial recommendation to the convening authority.

United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954). When a staff judge advocate becomes and advocate for the prosecution as a trial counsel or appellate counsel, however, he or she is disqualified from providing a recommendation. *Brown, supra; United States v. Graham*, 17 CMR 889 (AFBR 1954). In the case *sub judice*, the staff judge advocate and Captain Tooker became advocates against petitioner in litigation at the appellate level. The analysis by the court below misses the point of Article 6(c) and voluminous case law regarding post-trial processing. *In Brown, supra*, the then Army Court of Military Review held that a staff judge advocate, who had signed his name on appellate pleadings involving petitioner's case as a government attorney, could not later provide a recommendation to the convening authority: "To allow a former appellate advocate to offer the convening authority adverse advice on the very same matter offends our sense of judicial fairness and undermines the public perception of military judicial proceedings." 17 MJ 986, at 987. The drafters simply listed those persons most obviously involved in a particular servicemember's court-martial. The Air Force Court of Criminal Appeals' decision guts the intent and purpose of Article 6(c).

The Air Force Court also stated that reconsideration was requested because the staff judge advocate was confused over the continued "legal viability of our earlier opinion respecting sentence." That conclusion is unsupported by any evidence in the record. The Court of Appeals for the Armed Force's order of September 1995 was clear and not difficult to understand. Further, nowhere in the April 1996 staff judge advocate's recommendation or addendum does Captain Tooker state that the 8th Air Force legal office was confused. In fact, the recommendation point blank states "The court held that the reassessment by the Air Force Court of Military Review

limited the maximum sentence which could be approved by the convening authority to a bad-conduct discharge and reduction." This opinion was absolutely correct. Clearly, the 8th Air Force legal office simply disagreed with the rationale behind the Court of Appeals for the Armed Forces' decision and decided to urge the Appellate Government Division to challenge it by asking for reconsideration. This is further evident by reading the Petition for Reconsideration ultimately filed by the respondent. Nowhere in the Petition did respondent state that the 8th Air Force legal office was "confused." The Petition clearly shows that the 8th Air Force legal office and respondent knew exactly what the Court of Appeals for the Armed Forces' decision meant—they simply disagreed with that decision. The Air Force Court of Criminal Appeals' finding that the staff judge advocate was "confused" has no merit.

Waiver is not applicable

The disqualification of the personnel listed in Article 6(c) attaches to the work and not just the signature. *McCormick,* 755 (citations omitted). Mere concurrence by a staff judge advocate in a review prepared by a disqualified person does not constitute compliance with the requirement for impartial review. *Id,* at 755 (citation omitted). Although *McCormick* further cites many cases which hold that an erroneously drafted staff judge advocate recommendation by someone who is disqualified should be examined for prejudice, it is clear that such drafting on the part of, for instance, a trial counsel amounts to plain error. *United States v. Rice,* 33 MJ 451 (CMA 1991) ("The general principle underlying Rule for Court-Martial (R.C.M.) 1106(b) on disqualification is that the legal officer or staff judge advocate providing a recommendation to the convening authority must be neutral. The recommendation of a **biased** legal officer could unfairly

prejudice the convening authority's decision. Thus, plain error exists, and we are satisfied such error was prejudicial."). Further, Captain Tooker also completed the addendum to the staff judge advocate recommendation, which was not served upon defense counsel. Therefore, defense counsel did not have an opportunity to object to the addendum. *United States v. Holt,* 38 MJ 682 (AFCMR 1993), *petition denied,* 40 MJ 268 (CMA 1994); *United States v. Waddell,* ACM S29061 (A.F.Ct.Crim.App. 13 February 1996). (Appendix). Thus, waiver is not applicable.[2]

Prejudice

The 8th Air Force legal office's involvement with petitioner's clemency matters was plain error, and it must be presumed that such error in the post-trial processing of petitioner's case was prejudicial to petitioner because "we doubt that any public confidence in the integrity and impartiality of a process could be garnered when that process Air Force affords disqualified persons an 'inside track' for advancing their views and then purports to cloak those views with the mantle of impartiality." *McCormick, supra,* at 755, 756; *Coulter, supra; citing Gordon, supra; Leal, supra.*

The Air Force Court of Criminal Appeals, in the case *sub judice,* stated that "[petitioner] does not even attempt to argue whatever 'bias' subsists in the 8th [Air Force staff judge advocate's office] somehow prejudiced him" going on to note that the legal office did recommend that appellant (petitioner) get a couple of stripes back. This analysis ignores the facts. During the last clemency submissions by petitioner, defense counsel and petitioner requested (and defense counsel argued vigorously) that petitioner's bad conduct discharge be disapproved. It didn't happen. Captain Tooker and the staff

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[2]The Air Force Court did not specifically find waiver.

judge advocate strongly recommended to the convening authority that he disapprove the one thing petitioner was most interested in having disapproved—his bad conduct discharge.[3]

The people who provided a recommendation to the convening authority in petitioner's case took the lead role on appeal and actively participated in attempting to overturn the decision of the Court of Appeals for the Armed Forces. They became advocates for the Government in a controversy involving petitioner, indeed, directly involving the very issue that petitioner was soon to be involved in with the very same legal office convening authority—a new staff judge advocate recommendation, submission of clemency matters, and convening authority Action. The 8th Air Force legal office created a direct, adversarial, professional interest in the final outcome of the petitioner's case that had not existed before. It is clear they believed the Court of Appeals for the Armed Forces' opinion was wrong and did not believe another convening authority action had to be accomplished.

The processing of petitioner's case after the Court of Appeals for the Armed Forces' 27 September 1995 decision also shows that the processing of petitioner's case was not fair and impartial. For two months, despite the return of the record of trial to 8th Air Force by The Judge Advocate General of the Air Force to comply with the Court of Appeals for the Armed Forces' order, the 8th Air Force legal office (a subordinate office) did nothing with petitioner's case. No defense counsel

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[3]Appellant has a compelling case, before any unbiased legal office, for having his BCD disapproved. He has a conviction for wrongful use of marijuana and served 10 months in jail as part of the sentence adjudged by the court-members and approved by the convening authority the first time. The Air Force Court of Criminal Appeals eventually reduced his sentence to a BCD and reduction to E–l. This remedy, however, was hardly any remedy at all for, as appellant argued below, appellant did serve the 10 months in jail disapproved by the Air Force Court of Criminal Appeals.

was appointed. Petitioner was not contacted. These actions clearly showed that the 8th Air Force legal office, in the same adversarial nature as a trial counsel, became a biased participant in the appellate proceedings of petitioner's case.

In addition to the actual bias in this case and the perception of unfairness that Article 6(c) is designed to avoid, the staff judge advocate's recommendation provides no assurance that petitioner's latest clemency request was fairly and impartially reviewed. Word for word, blocks 38, 39, and 40 of Captain Tooker's recommendation are copied verbatim from previous staff judge advocate recommendations. Further, although by February 1996 petitioner had been in the Air Force over 24 years and was 42 years old, Captain Tooker wrote under block 39 that "Sergeant Dresen is 41 years old and has been in the Air Force for about 19 years and 6 months." He wrote those words because that is exactly what had been written in the staff judge advocate's recommendation from a year earlier. No effort was apparently made to ensure factual accuracy involving such an important matter.

CONCLUSION

Under the facts of this case, Article 6(c) was not complied with. As with a trial counsel, investigating officer, accuser, military judge, or defense counsel, the 8th Air Force legal office became a party to the controversy by instigating the Government's petition for reconsideration because they believed the Court of Appeals for the Armed Forces' decision to be in error. The 8th Air Force legal office involved themselves in the direct litigation, at the appellate level, of petitioner's case and became an advocate for the United States against petitioner. The 8th Air Force legal office became a party to "the controversy" and was not, therefore, free from any connection with the controversy.

Respectfully submitted,

/s/Margo Stone Newton

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November 1997

APPENDIX A

United States, Appellee

v.

Donald J. DRESEN, Technical Sergeant
U. S. Air Force, Appellant

No. 93–0949

Crim.App. No. 29249

United States Court of Appeals for the Armed Forces

Argued April 9, 1997

Decided September 15, 1997

Counsel

For Appellant: Captain Michael L. McIntyre (argued); *Colonel Jay L. Cohen* and *Colonel David W. Madsen* (on brief); *Lieutenant Colonel Kim L. Sheffield.*

For Appellee: *Lieutenant Colonel Michael J. Breslin* (argued); *Colonel Theodore J. Fink* (on brief); *Major LeEllen Coacher.*

Military Judge: Wade B. Morrison

Opinion of the Court

EFFRON, Judge:

At a contested trial in January 1991 at Carswell Air Force Base, Texas, appellant was convicted by a general court-martial composed of officer and enlisted members of charges that he had disobeyed a lawful order of a superior commissioned officer and that he had used marijuana on

divers occasions over a 9-month period. *See* Arts. 90 and 112a, Uniform Code of Military Justice, 10 USC §§ 890 and 912a, respectively. The members sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of $500.00 pay per month for 6 months, and reduction to the lowest enlisted grade. On the recommendation of his staff judge advocate (SJA), the convening authority set aside the disobedience finding and dismissed that charge as having been improperly referred. He did not disturb the marijuana-use finding and approved the sentence, except for confinement exceeding 10 months.

I. Prior Appellate Review

As a result of multiple deficiencies in the post-trial processing of this case, it has been reviewed on three occasions by this Court and by the court below.

In its initial review of this case, the Court of Military Review (subsequently redesignated as the Court of Criminal Appeals)[1] held that it could not be certain that the convening authority provided adequate relief with respect to the sentence following his dismissal of the disobedience charge. 36 MJ 1103, 1114 (1993). That court decided not to order a sentence rehearing, however, and took curative action by reducing the sentence to include only a bad-conduct discharge and reduction to the lowest enlisted grade. *Id.* at 1114–15. On appellant's petition from that decision, we ordered a new SJA's recommendation and convening authority's action, based upon an unrelated issue as to ineffective assistance of counsel during post-trial clemency proceedings. 40 MJ 462 (1994) (*Dresen I*).

When the case was returned to 8th Air Force, both the original SJA and the original convening authority had

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[1]*See* 41 MJ 213, 229 n. * (1994)

departed, and different officers occupied those positions. Upon recommendation of the new SJA, the new convening authority approved the same findings and sentence that the original convening authority had approved—the use charge and a bad-conduct discharge, confinement for 10 months, forfeiture of $500.00 pay per month for 6 months, and reduction to the lowest enlisted grade—despite the fact that the Court of Military Review had not affirmed the portions of the sentence that extended to confinement and forfeitures. 36 MJ at 1115.

The case was then forwarded to the Court of Criminal Appeals (previously designated as the Court of Military Review)[2] in February 1995, and that court affirmed the sentence approved in the second convening authority's action. On appellant's petition from that decision, we concluded that the SJA had committed plain error when he advised the convening authority that he could approve a sentence that included punishments that had not been affirmed by the Air Force appellate court during its initial review of the case, and we ordered a new recommendation and action. 43 MJ 372 (1995)(summary disposition) (*Dresen II*).

Three months later, on December 27, 1995, at the request of the 8th Air Force SJA, the Government filed a motion in this Court, asking us to allow filing out-of-time of a petition for reconsideration of our disposition of *Dresen II*. The Government argued that the legal basis upon which we had relied was not applicable and that, because we had set aside the lower court's decision in *Dresen I*, the lower court's decision in that case did not place a ceiling on the sentence that the convening authority could approve in a subsequent opinion. This Court denied the Government's motion to file the petition. 43 MJ 478 (1996) (*Dresen III*).

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[2]See note 1.

The record then was returned to 8th Air Force for a new SJA's recommendation and action by the convening authority. Both the SJA and the convening authority who had been involved in the second recommendation and action had departed, and these positions were now occupied by officers who had not held those positions during either of the earlier reviews of this case.

The new convening authority approved the remaining marijuana-use finding and, consistent with the decision in *Dresen II*, approved only that portion of the sentence that included a bad-conduct discharge and reduction to the grade of E–4.

The Court of Criminal Appeals, in an unpublished decision, affirmed the findings and the newly approved sentence. We granted appellant's petition for review of the following issue:

> WHETHER IT WAS IMPROPER FOR THE 8TH AF [AIR FORCE] LEGAL OFFICE, GIVEN THEIR ACTIVE INVOLVEMENT IN ATTEMPTING TO OVERTURN THE COURT OF APPEALS FOR THE ARMED FORCES' DECISION ORDERING A NEW ACTION, TO HAVE PROVIDED THE LEGAL ADVICE TO THE 8TH AIR FORCE COMMANDER, THE CONVENING AUTHORITY, REGARDING THE DISPOSITION OF APPELLANT'S CASE.

For the reasons discussed below, we hold that the 8th Air Force Legal Office was not disqualified from providing legal advice to the convening authority on this case

II. Analysis

Article 60(d), UCMJ, 10 USC 860(d) (1983), requires that a convening authority of a general court-martial "obtain and consider the written recommendation of his staff judge

advocate or legal officer" before taking post-trial action on the findings and sentence. The only statutory disqualification regarding who may serve as an SJA for this purpose is found in Article 6(c), UCMJ, 10 USC § 806(c), which provides:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

RCM 1106(b), Manual for Courts-Martial, United States (1995 ed.), contains the same disqualification language found in Article 6(c). The non-binding Discussion that accompanies RCM 1106(b) reflects concern that, in addition to the list of disqualifications, a person may become "ineligible" to serve as a staff judge advocate in a particular case by virtue of other prior activity by that person. The Discussion states:

> The staff judge advocate or legal officer may also be ineligible when, for example, the staff judge advocate or legal officer served as the defense counsel in a companion case; testified as to a contested matter (unless the testimony is clearly uncontroverted); has other than an official interest in the same case; or must review that officer's own pretrial action (such as the pretrial advice under Article 34; *see* RCM 406) when the sufficiency or correctness of the earlier action has been placed in issue.

Appellant does not contend that the officer who was the 8th Air Force SJA on the last occasion of review by that office had served in any of the above-listed conflicted positions. Reflecting the fact that a different officer served as the SJA during each of the three post-trial proceedings in this case, appellant does not urge a theory of personal disqualification.

Instead, as the granted issue reflects, appellant contends that the entire "8th AF legal office" should be disqualified from providing a recommendation to the convening authority by virtue of the involvement of that office, institutionally, in asking the appellate government division to seek reconsideration of *Dresen II*.

In some cases, our Court specifically has required that a new post-trial recommendation and action be done by a "new" or a "different" staff judge advocate and convening authority. *See United States v. Rice*, 33 MJ 451, 453 (CMA 1991). Article 6(c), RCM 1106(b), the Discussion following that rule, and the relevant precedents of this Court all demonstrate sensitivity to the need that the officers performing those important statutory responsibilities be, and appear to be, objective. *See, e.g., United States v. Newman*, 14 MJ 474, 482 (CMA 1983); *United States v. Collins*, 6 MJ 256, 257–58 (CMA 1979); *United States v. Engle*, 1 MJ 387, 389 (CMA 1976).

In this case, however, appellant did not ask us during any of the prior proceedings to disqualify a particular SJA or legal office, and nothing in our prior actions suggested any such disqualification. While it might be possible to conceive of a hypothetical case in which an entire legal office could become so conflicted that the post-trial recommendation should be done by a different SJA's office, that would be an unusual case. Appellant has the burden to demonstrate the basis for an alleged disqualification, but he has not done so here.

The individuals best situated to address the potential for bias were those directly involved in the post-trial action. Appellant, however, did not even comment on this matter when responding to the last SJA's recommendation, even though the SJA forthrightly set forth the history of the case—including the statement that "[t]his office requested, through appellate channels, that the United States Court of Appeals for

the Armed Forces reconsider their order." 1996 SJA Recom. at ¶ 36b. *Compare United States v. Caritativo,* 37 MJ 175, 183 (CMA 1993)(accused's failure to challenge SJA's impartiality prior to or during trial or in his clemency petition to the convening authority waived appellate claim for new recommendation on that ground), *with Rice,* 33 MJ at 453 (plain error for recommendation to be prepared by legal officer who had testified at sentencing as a witness in aggravation). *See also United States v. Edwards,* 45 MJ 114, 115–16 (1996) (no waiver of challenge to SJA's impartiality where defense counsel not fully aware of circumstances).

Appellant had ample opportunity during our prior consideration of the case and during the convening authority's most recent action to demonstrate that the SJA or the legal office should have been disqualified. He did not do so. Additionally, he has not demonstrated any basis for us to find plain error in the face of his prior failure to seek such relief. The action of the second SJA, after our decision in *Dresen II,* was limited to a professional request that the Appellate Government Division in Washington, DC, ask us to reconsider that decision. There were reasonable questions and differing views about the precise meaning and the impact of our earlier order, which the Government—exercising its discretion in behalf of the SJA and the convening authority—sought to answer through filing the petition for reconsideration. It is not the sort of activity that would provide the basis for an institutional challenge to a subsequent SJA or an entire legal office.

III. Decision

The 1996 decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges SULLIVAN, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DONALD J. DRESEN, FR396–60–2733
United States Air Force

ACM 29249 (f rev)

30 July 1996

Sentence adjudged 23 January 1991 by GCM convened at Carswell Air Force Base,Texas. Military Judge: Wade B. Morrison.

Approved sentence: Bad-conduct discharge and reduction to E–4.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain Michael L. McIntyre.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Lieutenant Colonel Michael J. Breslin.

Before

PEARSON, MORGAN, C. H., II, and MORGAN, J.H.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

MORGAN, C. H., II, Judge:

This peripatetic case is before us for the third time, and for the third time we affirm.

While his administrative discharge for personal drug abuse was being processed, appellant's name came up for random urinalysis on March 5, 1990. Possibly fearing he was "hot"[1] appellant engaged in various stall tactics for several hours after the last individual had been processed. He insisted that his constitutional rights were being violated, demanded to see a lawyer, and adamantly declined to submit a urine sample. When given a direct order to do so by a judge advocate, Captain (Caps) Kaar, he mocked Capt Kaar's authority, declaring his belief that Capt Kaar, as a legal officer, could not tell him what to do. Only after the acting base commander authorized catheterization did the appellant finally submit a urinalysis.

At about the same time, Airman First Class (A1C) Link, provided information to the Air Force Office of Special Investigations (AFOSI), to the effect that appellant was a known, frequent user of marijuana. A1C Link believed that appellant actually smoked marijuana on the job, in uniform, because he had smelled smoke coming from appellant's room in the dormitory and on his uniform, and had observed him smoking what appeared to be a hand-rolled marijuana cigarette.

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[1]Appellant's specimen was subsequently resumed from the laboratory as "unsuitable for testing." The urinalysis itself formed no part of his prosecution, which proceeded on the basis of his own admissions of frequent use over a period of years and the observations of Airman First Class Link.

Charges for disobedience of Capt Kaar's order, the subsequent order of a chief master sergeant to submit a urinalysis sample, and for use of marijuana on divers occasions between March 1, 1989 and November 30, 1989 were preferred in September with trial scheduled for October 2, 1990. As a result of defense counsel's illness, it was rescheduled for November 1, 1990. Then appellant purported to hire a civilian defense counsel, and the trial was again rescheduled for December. By letter of December 19, 1990, appellant informed the trial judge that he had released his civilian defense counsel. Having already fired a number of local defense counsel, appellant was given a new defense counsel and an individual military counsel from the circuit office. He announced that he was satisfied with his representation in the same December 19 letter to the military judge. Nevertheless, on January 15, 1991, the first day of trial, appellant "fired" both counsel and demanded the military judge appoint a new civilian defense counsel to represent him and that the trial be further delayed another "six to eight weeks."

After nearly four months of delay, the military judge denied appellant's request, and allowed him, after repeated warnings to the contrary, to proceed *pro se,* with one of the defense counsel seated at the table with him. It was later discovered that appellant's plan was to delay the trial, apparently in the mistaken belief that when he reached 20 years of service, he could simply retire. It developed that the "conflict" between appellant and his various defense counsel stemmed from appellant's desire to defend his case by admitting to frequent use of marijuana to help relic him on the job. Indeed, during the course of the trial, before members consisting of enlisted representation, appellant freely admitted to frequent use since 1974, but felt that it was none of the Air Force's business, since, in appellant's view, his job

performance did not suffer. He attributed his prosecution to a desire on the part of Air Force authorities to punish him because of his frequent inspector general complaints over the condition of the dormitories on base.

The members convicted him of disobeying Capt Kaar's order and of the use of marijuana, but acquitted him of disobeying the chief master sergeant's order. They sentenced him to a bad-conduct discharge, confinement for 1 year, forfeiture of $500 per month for six months, and reduction to the grade of E–l, airman basic. Yet another counsel, Capt N. was appointed to represent appellant during clemency proceedings. The convening authority, at the urging of his staff judge advocate (SJA), disapproved the finding of guilty of the disobedience charge, not on the basis of lack of proof, but out of an excess of caution as a result of an administrative error in the referral order. The SJA recommended the convening authority reduce the confinement to 10 months, which he did.

We reviewed the case and affirmed. *United States v. Dresen,* 36 M.l. 1103 (A.F.C.M.R. 1993). However, "uncomfortable" with the comparative modest sentence relief afforded by the convening authority following his disapproval of the disobedience charge, we reassessed the sentence and disapproved all of the confinement and forfeitures. We also noted that Capt N, in her clemency presentation, had specifically requested relief which included the bad-conduct discharge, without appellant's consent.[2] We found this to be

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[2]As in other situations, appellant had difficulty getting along with counsel. According to him, she would not meet personally with him and declined to return his telephone calls. According to her, she did return his calls, many times. The real difficulty was that he refused to listen to her advice and sent letters and documents which were not, in her judgment, in his best interest, but rather tended to exacerbate his situation.

error, but remarking on her otherwise excellent clemency presentation, decided it was harmless.

The Court of Appeals for the Armed Forces, then the Court of Military Appeals, disagreed with our conclusion regarding the harmlessness of Capt N's presentation, and reversed. *United States v. Dresen,* 40 M.J. 462 (C.M.A. 1994). It set aside our decision and returned the record of trial to The Judge Advocate General of the Air Force "for referral to a new convening authority for a recommendation by the staff judge advocate and action by the convening authority, after appellant and defense counsel have had full opportunity to offer whatever matters they wish for consideration in this regard." *Dresen,* 40 M.J. at 465.

This was done, and we affirmed in a *per curium* decision of May 10, 1995. However, on July 5, 1995, appellant filed a Supplement to his Petition for a Grant of Review to the Court of Appeals for the Armed Forces, arguing that the most recent Staff Judge Advocate's Recommendation (SJAR) had incorrectly advised the convening authority that he could approve 10 months confinement. The Court of Appeals for the Armed Forces granted relief on this basis by order of September 27, 1995. It set aside our May 10, 1995 decision and returned the record for a third convening authority action.

A new SJAR was prepared advising the convening authority that he could approve no more than a bad-conduct discharge and a reduction to airman basic. The SJA continued:

> While we believe that the adjudged sentence is appropriate for the accused's repeated use of marijuana standing alone, we also believe, in light of the appellate actions taken in this case, that further sentence reassessment is in order. Therefore, we recommend that you approve the adjudged discharge and the reduction, but only to E–3 [airman first class].

By order dated April 2, 1996, the convening authority took clemency one step farther, approving the bad-conduct discharge and reduction to the grade of E–4, senior airman. This matter is now before us with three new assignments of error: (1) that the sentence is inappropriately severe; (2) that the office of the staff judge advocate to the convening authority should be disqualified from writing the advice to the convening authority in view of its request for reconsideration of our superior Court's September 27, 1995 order, and (3) that the Air Force failed to comply with the Court of Appeals for the Armed Forces 1994 referral to a "new" convening authority.

Sentence Seventy

Nothing in the appellate tennis match which has ensued since appellant's conviction and the first action of the convening authority has diminished or impeached what appellant did. He was not merely a one-time casualty of the Air Force urinalysis testing program, he virtually flaunted his marijuana abuse, in front of subordinates, superiors and ultimately, members of his court-martial. His outspoken belief that marijuana should be treated no differently than alcohol, and that he was entitled to smoke marijuana as a result of job pressures stemming from his role as a dormitory manager at Carswell Air Force Base, bespeak of a profound contempt for Air Force authority in general, and the special trust reposed in noncommissioned officers specifically. Our superior Court in its 1994 opinion, declared "[w]e are not convinced that the Court of Military Review abused its discretion when it decided that it confidently could conclude that appellant's adjudged sentence would have included at least a bad-conduct discharge and reduction to the lowest enlisted grade, even without the improper conviction for disobedience." *Dresen,* 40 M.J. at 464. The only significant change since that time has

been that the convening authority has now restored three stripes to appellant.[3] We find, therefore, that the sentence, as approved, is not inappropriate.

The Convening Authority's SJA is Not Disqualified

Evidently appreciating the ratchet effect of repeated referrals to convening authorities, notwithstanding the fact that in the most recent action a five stripe reduction was reduced to a two stripe reduction, appellant asks that we send his case back a *fourth* time. He argues that, because the 8th Air Force (AF) SJA asked that the Air Force request reconsideration by the Court of Appeals for the Armed Forces of its September 27. 1995 order, it betrayed a prosecutorial bias, and was disqualified from further review under Article 6(c), UCMJ, 10 U.S.C. § 10 U.S.C. 806(c). Article 6(c) provides that:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

Appellant cites no authority, nor are we aware of any, which disqualifies a staff judge advocate under the circumstances *sub judice.* No member of the 8th AF legal office acted in any capacity listed in Article 6(c).

Nor did the request for reconsideration reveal an impermissible bias. Under the circumstances, we appreciate

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[3]In an affidavit submitted with his most recent brief, appellant complains that he has yet to be reimbursed the $3,000 forfeiture. We assume that this is because to date he has never had an approved, affirmed sentence. The restoration of two stripes will add to the amount of money to which appellant will be entitled.

that there was some potential for confusion in the office following the September 27, 199S, order. The 1994 opinion of the Court of Appeals for the Armed Forces had vacated our decision, a vacation which seemingly comprehended our reassessment of the sentence. The order recited R.C.M. 810(d)(1) as authority for the proposition that the SJA erred in advising the convening authority that he could approve 10 months confinement. R.C.M. 810(d)(1) reads, in pertinent part, as follows:

> Except as otherwise provided in [the provision relating to pretrial agreements] offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for punishment in excess of or more severe than the legal sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority. . . .

No retrial or rehearing had been ordered, and the SJA was confused over the continued legal viability of our earlier opinion respecting sentence. In addition, of course, defense counsel made no complaint about the SJAR.

Furthermore, appellant does not even attempt to argue that whatever "bias" subsists in the 8th AF SJA office somehow prejudiced him. The SIA assiduously honored the decision of the Court of Appeals for the Armed Forces, not only advising the convening authority that he could not approve any confinement, but recommending further sentencing relief. The convening authority then went one better, adding another stripe in his action. With that in mind, we reject this assignment of error.

Failure to Comply with 1994 Court of Appeals for the Armed Forces

Appellant argues that the government disobeyed the order of the Court of Appeals for the Armed Forces in its 1994

decision to return the record of trial for a new recommendation and action by a "new" convening authority. We could decide this issue by the simple observation that it is moot. However, it is clear that our superior Court was primarily interested in ensuring that any subsequent action by the convening authority respecting appellant's case was not tainted by the improper concession of Capt N. The original action had been taken by the then commander of 8th Air Force, Lt General Schuler. The second action, following return of the record and a new SJAR, was taken by Lt General Croker, a "new" convening authority. Nothing in the 1994 decision, nor any reason grounded in common sense, suggests that the Court of Appeals for the Armed Forces wanted the action referred to a separate *command*.[4]

The findings and sentence are correct in law and in fact, the sentence is not inappropriate, and the same are hereby

AFFIRMED.

Senior Judge PEARSON and Judge MORGAN concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court

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[4]We note that, even though the September 27, 1995 order did not specify a "new" convening authority, yet a third general officer, Lt General Ford, took the action in this case.

APPENDIX C

*372 43 M.J. 372

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Daily Journal

Wednesday, September 27, 1995

95–248

APPEALS—SUMMARY DISPOSITIONS

95–245248 No. 93–0949/AF. *U.S. v. Donald J. Dresen.* CCA 29249. On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals on further review, we hold that the staff judge advocate improperly advised the convening authority when he stated the maximum sentence which could be approved included a bad-conduct discharge, confinement for 10 months, forfeiture of $500.00 pay per month for six months, and reduction to the lowest enlisted grade (E–1). The United States Air Force Court of Criminal Appeals (formerly the Court of Military Review) had previously reassessed appellant's sentence and affirmed only so much of the sentence as provided for a bad-conduct discharge and reduction to E–1. This action limited the sentence which the convening authority could approve on further review. RCM 810(d)(1), Manual for Courts-Martial, United States, 1984. This Court has consistently held that an accused's best hope for sentence relief lies with the convening authority. *United States v. Bono,* 26 M.J. 240, 243 n. 3 (C.M.A.1988), *citing United States v. Wilson,* 9 U.S.C.M.A. 223, 226, 26 C.M.R. 3,

6, 1958 WL 3280 (1958). Although defense counsel did not bring this to the convening authority's attention, we hold that such misleading advice is plain error. *See United States v. Demerse*, 37 M.J. 488 (C.M.A.1993). Thus, we hold that appellant is entitled to a new staff judge advocate's recommendation and a new convening authority's action. Accordingly, it is ordered that the petition for grant of review is hereby granted on the issue raised by appellate defense counsel; and that the decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for resubmission to the convening authority for a new staff judge advocate's recommendation and action. Following these proceedings, Articles 66 and 67, Uniform Code of Military Justice, 10 USC §§ 866 and 867 (1989), shall apply. [See also ORDERS GRANTING PETITION FOR REVIEW this date.]

ORDERS GRANTING PETITION FOR REVIEW

95–245249 No. 93–0949/AF. *U.S. v. Donald J. Dresen.* CCA 29249. [See also APPEALS—SUMMARY DISPOSITIONS this date.]

PETITIONS FOR GRANT OF REVIEW FILED

95–245250 No. 95–1216/AR. *U.S. v. Chuckle L. Bowling.* CCA 9400970.

INTERLOCUTORY ORDERS

95–245251 No. 94–5011/NA. *U.S. v. Christopher J. Bubonics.* CCA 92–2014. Appellant's motion to cite supplemental authority granted.

MANDATES ISSUED

95–245252 No. 94–0325/AF. *U.S. v. Gregory A. Dale.* % 17 CMR 29794.

APPENDIX D

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DONALD J. DRESEN, FR396–60–2733
United States Air Force

ACM 29249 (f rev)

12 May 1995

Sentence adjudged 23 January 1991 by GCM convened at Carswell Air Force Base, Texas. Military Judge: Wade B. Morrison (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of $500 pay per month for 6 months, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Captain David D. Jividen, and Captain Robert E. Watson.

Appellate Counsel for the United States: Colonel Thomas E. Schlegel and Captain Jane Harless.

Before

SNYDER, PEARSON, and SCHREIER
Appellate Military Judges

UPON FURTHER EVIEW

PER CURIAM:

In our ordinal review of this case this Court approved the findings but reassessed the sentence and approved it as reassessed. *United States v. Dresen,* 36 M.J. 1115 (A F.C.M.R. 1993). The then Court of Military Appeals, however, set aside our decision and ordered a new Staff Judge Advocate Recommendation and a new action by the convent authority. *United States v. Dresen,* 40 M.J. 462, 465 (C.5l.A. 1994).

Those actions have been completed and we find the findings and sentence correct in law and fact. Accordingly, they are hereby

AFFIRMED.

APPENDIX E

*462 UNITED STATES, Appellee

v.

Donald J. DRESEN, Technical Sergeant U.S. Air Force, Appellant.

No. 93–0949/AF.

CMR No. 29249.

U.S. Court of Military Appeals.

Argued June 2, 1994.

Decided Sept. 22, 1994.

Accused was convicted by a general court-martial, Wade B. Morrison, J., of willful disobedience of superior commissioned officer and divers uses of marijuana. The United States Air Force Court of Military Review, 36 M.J. 1103, affirmed as reassessed. Review was granted. The United States Court of Military Appeals, Wiss, J., held that: (1) improper referral to trial of disobedience charge did not prejudice accused, but (2) Court of Military Review erred when, after finding that accused's defense counsel committed posttrial error by requesting convening authority approval of bad conduct discharge contrary to accused's express desire for clemency form of disapproval of punitive separation, it failed to return record of trial for new convening authority action.

Decision set aside and record returned for new action.

1. MILITARY JUSTICE k1433

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1430	Appellate Disposition
258Ak1433	Reassessment to cure error.

C.M.A. 1994.

When Court of Military Review finds trial error that impacted on adjudged sentence, it may put itself in shoes of military judge or court members who originally adjudged sentence and reassess sentence to one no greater than that which sentencing body would have adjudged absent the error.

2. MILITARY JUSTICE k1433

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak430	Appellate Disposition
258Ak1433	Reassessment to cure error.

[See headnote text below]

2. MILITARY JUSTICE k1434

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1430	Appellate Disposition
258Ak1434	Remand; rehearing.

C.M.A. 1994.

When Court of Military Review finds trial error that impacted on adjudged sentence but cannot put itself in shoes

of original sentencer and reassess sentence to one no greater than that which sentencing body would have adjudged absent error, it must then set aside sentence and order sentence rehearing at which sentence may be adjudged that is untainted by error in question.

3. MILITARY JUSTICE k1322.1

58A —
258AVIII Sentence
258Ak1322 Nature and Extent of Punishment
258Ak1322.1 In general.

[See headnote text below]

3. MILITARY JUSTICE k1433

258A —
258AX Review of Courts-Martial
258AX(B) Further Review
258AX(B)1 In General
258Ak1430 Appellate Disposition
258Ak1433 Reassessment to cure error.

C.M.A. 1994.

Court of Military Review did not abuse its discretion when it concluded that accused's adjudged sentence would have included at least bad conduct discharge and reduction to lowest enlisted grade, even without his improper conviction for disobedience; while disobeying superior officer's order to give urine sample was serious military misconduct, that order in fact merely related to course of drug abuse over many months which was subject of remaining, valid conviction, particularly since, after rejecting services of detailed defense counsel, accused proceeded pro se and adamantly maintained that his marijuana use never hurt his duty performance and was justified for relaxation purposes.

4. MILITARY JUSTICE k1242

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

[See headnote text below]

4. MILITARY JUSTICE k1316.1

258A —
258AVIII Sentence
258Ak1316 Presentencing Argument
258Ak1316.1 In general.

C.M.A. 1994.

Counsel may not ask court-martial to impose punitive discharge when accused's wishes are to the contrary.

5. MILITARY JUSTICE k1242

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

[See headnote text below]

5. MILITARY JUSTICE k1316.1

258A —
258AVIII Sentence
258Ak1316 Presentencing Argument
258Ak1316.1 In general.

C.M.A. 1994.

When defense counsel seeks punitive discharge or concedes appropriateness of punitive discharge, even as tactical step to accomplish mitigation of other elements of possible sentence, counsel must make record that such advocacy is pursuant to accused's wishes.

6. MILITARY JUSTICE k1242

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

[See headnote text below]

6. MILITARY JUSTICE k1316.1

258A —
258AVIII Sentence
258Ak1316 Presentencing Argument
258Ak1316.1 In general.

C.M.A. 1994.

Posttrial advocacy that asks for or accepts appropriateness of approval of adjudged punitive discharge, even as imposed quid pro quo for substantially reduced confinement, was error when acceptance of discharge flew squarely in the face of accused's desire to avoid it.

7. MILITARY JUSTICE k1428

258A —
258AX Review of Courts-Martial
258AX(B) Further Review
258AX(B)I In General
258Ak1423 Harmless or Prejudicial Error; Test for Reversible Error

258Ak1428 Post-trial proceedings.

C.M.A. 1994.

Accused was prejudiced by counsel's inadequate posttrial representation in advocating bad conduct discharge, contrary to accused's wishes and thus was entitled to resentencing; it was not certain that convening authority would approve discharge against forceful and persuasive plea for clemency, and honorable discharge had already been approved for accused based on his administrative request to terminate service as result of positive urinalysis, and accused had furnished Air Force and country with lengthy dedicated service and apparently was victim of psychological chemical dependence on marijuana.

*463 For Appellant: *Captain Robert E. Watson* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse* and *Captain David D. Jividen.*

For Appellee: *Captain Jane L. Harless* (argued); *Lieutenant Colonel Thomas E. Schlegel* (on brief); *Colonel Jeffery T. Infelise.*

Opinion of the Court

WISS, Judge:

A general court-martial of officer and enlisted members convicted appellant, over his not-guilty pleas, of willfully disobeying an officer and using marijuana on divers occasions between March and November 1989, in violation of Articles 90 and 112a, Uniform Code of Military Justice, 10 USC Secs. 890 and 912a, respectively. The members sentenced appellant to a bad-conduct discharge, confinement for 1 year, forfeiture of $500.00 pay per month for 6 months, and reduction to the lowest enlisted grade. The convening authority disapproved the disobedience conviction and dismissed that charge because it had not been properly referred to trial. He

approved, however, the marijuana finding and the adjudged sentence except for reducing the confinement to 10 months.

In the Court of Military Review, appellant raised a number of issues. Rejecting several appellate complaints, the court did agree that appellant had received inadequate representation post-trial when defense counsel, in "otherwise excellent advocacy for appellant," pleaded in her clemency brief to the convening authority that appellant should receive a sentence rehearing or, alternatively, approval of the punitive discharge but substantially reduced confinement. The court reasoned:

> Of all the possible court-martial punishments, the bad-conduct discharge was the one thing appellant did not desire. Although Captain N probably was entirely correct in viewing it as unlikely the convening authority would disapprove the bad-conduct discharge, it was error under the circumstances of this case to specifically request relief which included the bad-conduct discharge *without appellant's consent* . . . .

36 MJ 1103, 1113 (1993). Nonetheless, the court found no violation of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because appellant had not been prejudiced by this misstep by counsel—the second of two prongs which must be satisfied to carry the day on an issue of inadequate representation. 36 MJ at 1113.

The Court of Military Review agreed with another of appellant's claims, too. In view of the fact that the convening authority had disapproved the conviction of disobedience of an officer, the court had some "discomfort . . . with whether the convening authority could meaningfully determine what sentence would have been adjudged in the absence of the disobedience offense." *Id.* at 1114. It decided, however, that a sentence rehearing would not be necessary to remedy any

possible flaw in this respect. Itself reassessing the sentence in line with what would have been adjudged for the divers uses of marijuana, the court detailed all of the circumstances appropriately before the sentencing body and concluded that it was "confident [that] appellant's sentence would have included, as a minimum, a bad-conduct discharge and reduction. [*United States v.*] *Peoples,* 29 MJ [426] at 429 [(CMA 1990)]; [*United States v.*] *Sales*, 22 MJ [305] at 307 [(CMA 1986)]." 36 MJ at 1115. As thus reassessed, the court affirmed the findings and sentence.

***464** These two portions of the opinion below form the bases for the two issues on which this Court granted appellant's petition for review:

I

WHETHER THE IMPROPER REFERRAL TO TRIAL OF CHARGE I AND ITS SPECIFICATION ENTITLES APPELLANT TO A NEW TRIAL ON SENTENCE.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN, AFTER FINDING THAT APPELLANT'S DEFENSE COUNSEL "COMMITTED [POST-TRIAL] ERROR" BY REQUESTING CONVENING AUTHORITY APPROVAL OF THE BAD-CONDUCT DISCHARGE CONTRARY TO APPELLANT'S EXPRESSED DESIRE FOR CLEMENCY IN THE FORM OF DISAPPROVAL OF THE PUNITIVE SEPARATION, IT FAILED TO RETURN THIS RECORD OF TRIAL FOR A NEW CONVENING AUTHORITY ACTION DUE TO THEIR FINDING OF "NO PREJUDICE."

While we find no merit in the first issue, we do agree with appellant as to the second and, accordingly, will order a new action by the convening authority following opportunity for appellant to submit a complete clemency package for the convening authority's consideration.

[1][2] Turning to the first issue, this Court has made it clear that, when the Court of Military Review finds a trial error that impacted on the adjudged sentence, it may "put itself in the shoes of the military judge or court members who originally adjudged the sentence" and reassess the sentence to one no greater than that which the sentencing body would have adjudged, absent the error. *United States v. Peoples,* 29 MJ at 428. If the court is unable to do so, it then must set aside the sentence and order a sentence rehearing at which a sentence may be adjudged that is untainted by the error in question. *Id. Accord United States v. Sales. supra; United States v. Suzuki,* 20 MJ 248 (CMA 1985).

[3] We are not convinced that the Court of Military Review abused its discretion when it decided that it confidently could conclude that appellant's adjudged sentence would have included at least a bad-conduct discharge and reduction to the lowest enlisted grade, even without the improper conviction for disobedience. *See generally United States v. Reed,* 33 MJ 98, 99 (CMA 1991) (Court of Military Review must be able "confidently" to "discern the extent of [an] error's effect on the sentencing authority's decision" before it may purge the error by reassessment). While disobeying a superior officer's order to give a urine sample is serious military misconduct, that order in fact merely related to the course of drug abuse over many months which was the subject of the remaining, valid conviction. In fact, appellant already had been processed for administrative discharge due to an earlier instance of drug abuse that had been detected by command-directed urinalysis.

Moreover, after adamantly rejecting the services of his detailed defense counsel, appellant proceeded *pro se* and was unwavering in his position at trial that his marijuana use never hurt his duty performance and that it was justified "as a sedative to relax and ease the tension" of problems at work and "of his marriage to an alcoholic spouse." *See* 36 MJ at 1114. In reflecting on the sentence actually adjudged by the members, it would not appear that the Court of Military Review abused its discretion when concluding that, under these circumstances, the members would have adjudged at least the punitive discharge and reduction in grade for the divers uses of marijuana by this noncommissioned officer who had betrayed his some 18 years of service. (FN*)

***465. II**

The nut of the dispute between the parties on the second issue is whether the court below erred when it concluded that appellant had not satisfied the second prong of *Strickland v. Washington, supra*—specifically, that he had suffered prejudice from his counsel's error. As indicated earlier, appellant represented himself during the trial, but defense counsel was appointed to pursue appellant's posttrial remedies, including filing a clemency petition with the convening authority. *See generally United States v. Palenius,* 2 MJ 86 (CMA 1977).

[4][5] Of course, an accused has a right to ask the sentencing authority for a particular punishment to the exclusion of other kinds of permissible penalties, and a defense counsel may advocate an accused's wishes in this regard in an effort to effectuate them. *United States v. Weatherford,* 19 USCMA 424, 42 CMR 26 (1970). Counsel may not, however, ask a court-martial to impose a punitive discharge when the accused's wishes are to the contrary. *United States v. Robinson,* 25 MJ 43 (CMA 1987); *United*

States v. Webb, 5 MJ 406 (CMA 1978); *United States v. Weatherford, supra.* Accordingly, when defense counsel does seek a punitive discharge or does concede the appropriateness of such a discharge—even as a tactical step to accomplish mitigation of other elements of a possible sentence—counsel must make a record that such advocacy is pursuant to the accused's wishes. *United States v. Lyons,* 36 MJ 425 (CMA 1993); *United States v. McNally,* 16 MJ 32 (CMA 1983).

[6] Similar considerations inexorably lead to a similar conclusion regarding any post-trial advocacy that asks for or accepts the appropriateness of approval of an adjudged punitive discharge. *See generally United States v. Palenius, supra.* Indeed, as we noted earlier, the Court of Military Review held that defense counsel here erred in her advocacy of a bad-conduct discharge—even as an implied *quid pro quo* for substantially reduced confinement—when acceptance of the discharge flew squarely in the face of appellant's desire to avoid it.

[7] We do not agree with the court, however, that appellant suffered no prejudice from counsel's inadequate representation. Just because the court concluded that the court-martial would have sentenced appellant to a bad-conduct discharge for his divers uses of marijuana even in the absence of the other conviction, it is not a necessary conclusion that the convening authority would have approved the discharge against a forceful and persuasive plea for clemency in that regard. Appellant had furnished the Air Force and his country with lengthy dedicated service and apparently was a victim of a psychological chemical dependence on marijuana. The Secretary of the Air Force already had approved an honorable discharge based on appellant's administrative request to terminate his service as a result of his earlier positive urinalysis, so the relationship

between appellant and the Air Force soon would have been severed even in the absence of the punitive discharge.

This Court often has referred to the convening authority's clemency powers as an "accused's best hope for sentence relief," *see. e.g., United States v. Stephenson,* 33 MJ 79, 83 (CMA 1991). Unfortunately, appellant's "best hope" was dashed by his own advocate. He deserves another opportunity.

III

The decision of the United States Air Force Court of Military Review and the action of the convening authority are set aside. The record of trial is returned to the Judge Advocate General of the Air Force for referral to a new convening authority for a recommendation by the staff judge advocate and action by the convening authority, after appellant and defense counsel have had full opportunity to offer whatever matters they wish for consideration in this regard.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

FN* As these comments fairly imply, neither do we find the corrective action by the Court of Military Review to be insufficient as a matter of law. *See United States v. Dukes,* 5 Mj 71 (CMA 1978); *United States v. Christopher,* 13 USCMA 231, 32 CMR 231 (1962).

APPENDIX F

*1103 UNITED STATES

v.

Technical Sergeant Donald J. DRESEN, FR396–60–2733, United States Air Force.

ACM 29249.

U.S. Air Force Court of Military Review.

Sentence Adjudged 23 Jan. 1991.

Decided 22 March 1993.

Accused was convicted by general court-martial, Carswell Air Force Base, Texas, Wade B. Morrison, J., of willful disobedience of superior commissioned officer and divers uses of marijuana. Convening authority disapproved findings on willful disobedience offense, dismissed that charge and specification, and reduced confinement portion of sentence. The United States Air Force Court of Military Review, Snyder, J., held that: (1) accused was not entitled to continuance to obtain civilian counsel; (2) accused was aware of and appreciated risks of self-representation; (3) accused was not denied effective assistance of counsel; and (4) sentence would be reassessed.

Affirmed, as reassessed.

1. MILITARY JUSTICE k1187.1

258A —
258AVI Time for Trial and Continuance
258Ak1187 Continuances
258Ak1 187.1 In general.

AFCMR 1993.

Military judge is authorized to grant request by either party for continuance as often as fairness may dictate. UCMJ, Art. 40, 10 U.S.C.A. Sec. 840.

2. MILITARY JUSTICE k1 187.1

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 187.1 In general.

AFCMR 1993.

Request for continuance is addressed to sound discretion of trial judge, and only clear abuse of that discretion will result in error; such discretion is very broad, and only myopic insistence upon expeditiousness in face of justifiable need for delay, which must be determined on case-by-case, will constitute abuse of discretion. UCMJ, Art. 40, 10 U.S.C.A. Sec. 840.

3. MILITARY JUSTICE k1 187.1

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 187.1 In general.

AFCMR 1993.

Some factors weighed in testing for abuse of discretion in denying continuance are: number of prior delays granted, timeliness and stage in proceedings continuance was requested, and, if based on dissatisfaction of counsel, adequacy of trial court's inquiry into accused's complaint against counsel. UCMJ, Art. 40, 10 U.S.C.A. Sec. 840.

4. MILITARY JUSTICE k1 188

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 188 Grounds.

AFCMR 1993.

Accused was not entitled to continuance to enable him to retain civilian counsel; there was more than reasonable basis on which to conclude that accused's request was made solely for purpose of delay, in view of prior delays granted to accused and timing of his request, and, other record evidence that ruling was unreasonable insistence on expeditiousness. UCMJ, Art. 32, 10 U.S.C.A. Sec. 832.

5. MILITARY JUSTICE k1 188

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 188 Grounds.

AFCMR 1993.

Accused's right to obtain civilian counsel at any point in trial does not guarantee accused delay in progress of trial for him to do so. UCMJ, Art. 38(b), 10 U.S.C.A. Sec. 838(b).

6. MILITARY JUSTICE k1 188

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 188 Grounds.

AFCMR 1993.

Right to counsel of one's choice, unlike Sixth Amendment right to assistance of counsel, is not absolute and

must be balanced against society's interest in efficient and expeditious administration of justice. UCMJ, Art. 38(b), 10 U.S.C.A. Sec. 838 (b); U.S.C.A. Const.Amend. 6.

7. MILITARY JUSTICE k1 188

258A —
258AVI Time for Trial and Continuance
258Ak1 187 Continuances
258Ak1 188 Grounds.

AFCMR 1993.

Sixth Amendment right to counsel may not be manipulated for purposes of delay or to thwart ends of justice. UCMJ, Art. 32, 10 U.S.C.A. Sec. 832; U.S.C.A. Const.Amend. 6.

8. MILITARY JUSTICE k1238. 1

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1238. 1 In general.

[See headnote text below]

8. MILITARY JUSTICE k1278

258A —
258AVII Trial
258Ak1278 Objections; waiver.

AFCMR 1993.

When, in face of trial judge's clear warning that substitute civilian counsel would not be produced at governments expense, accused insisted on discharging his detailed and individual military counsel for insufficient cause, he in fact waived assistance of those counsel and his action

was functional equivalent of knowing and voluntary choice to proceed *pro se*. U.S.C.A. Const.Amend. 6.

9. MILITARY JUSTICE k1238.1

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1238.1 In general.
[See headnote text below]

9. MILITARY JUSTICE k1278

258A —
258AVII Trial
258Ak1278 Objections; waiver.

AFCMR 1993.

Prior to allowing accused to waive representation by counsel and proceed *pro se*, judge must make accused award of disadvantages of self-representation and find that accused understands risks and disadvantages of self-representation and that accused's waiver of counsel is knowing and voluntary. R.C.M. 506(d); U.S.C.A. Const.Amend. 6.

10. MILITARY JUSTICE k1238.1

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1238.1 In general.

AFCMR 1993.

Standard for determining whether accused is competent to proceed pro se is not higher than one required for

conducting or assisting in one's defense. R.C.M. 506(d); U.S.C.A. Const.Amend. 6.

11. MILITARY JUSTICE k1241

258A	—
258AVII	Trial
258Ak1238	Defense Counsel
258Ak1241	Establishing and severing attorney-client relationship.

AFCMR 1993.

Trial judge should have particularized basis for its findings that accused, who wished to discharge counsel, clearly understood disadvantages of self-representation and was mentally competent to make that decision. R.C.M. 506(d).

12. MILITARY JUSTICE k1241

258A	—
258AVII	Trial
258Ak1238	Defense Counsel
258Ak1241	Establishing and severing attorney-client relationship.

[See headnote text below]

12. MILITARY JUSTICE k1426

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1423	Harmless or Prejudicial Error; Test for Reversible Error
258Ak1426	Trial matters.

AFCMR 1993.

Trial judge's error in failing to particularize basis for his findings that accused clearly understood disadvantages of self-representation and was mentally competent to make decision was not prejudicial, in that record clearly established basis for findings and demonstrated only that trial judge did not abandon accused while he was proceeding claim to original U.S. Govt. works *pro se.* R.C.M. 506(d).

13. MILITARY JUSTICE k1238.1

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1238.1 In general.

AFCMR 1993.

Military counsel could be seated at accused's counsel table, though accused was proceeding *pro se,* where trial judge provided clear instruction to court members regarding military counsel's role at trial; instruction and military counsel's presence in no way infringed on perception that accused was representing himself.

14. MILITARY JUSTICE k1247.1

258A —
258AVII Trial
258Ak1247 Reception of Evidence
258Ak1247.1 In general.

AFCMR 1993.

Military judge should not have asked military counsel if particular unit was assigned to ***1103** his home base, while ruling on admissibility of document, and used military counsel's answer to exclude document from evidence, where accused was proceeding *pro se.*

15. MILITARY JUSTICE k1425

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1423	Harmless or Prejudicial Error; Test for Reversible Error
258Ak1425	Evidence and witnesses.

AFCMR 1993.

Error in excluding document from evidence did not prejudice accused, where document related to collateral matter of minor importance.

16. MILITARY JUSTICE k1242

258A	—
258AVII	Trial
258Ak1238	Defense Counsel
258Ak1242	Effective assistance of counsel; multiple representation.

AFCMR 1993.

To successfully claim ineffective assistance of counsel, accused must demonstrate deficient performance or errors by counsel, and also demonstrate that he was prejudiced as result of claimed errors. U.S.C.A. Const.Amend. 6.

17. MILITARY JUSTICE k1242

258A	—
258AVII	Trial
258Ak1238	Defense Counsel
258Ak1242	Effective assistance of counsel; multiple representation.

AFCMR 1993.

Accused claiming ineffective assistance of counsel has burden to demonstrate counsel errors and claimed prejudice. U.S.C.A. Const.Amend. 6.

18. MILITARY JUSTICE k1242

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

AFCMR 1993.

Because of many decisions which are made during trial, latitude accorded counsel is wide, and tactical decisions will not be second guessed on appeal in context of claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

19. MILITARY JUSTICE k1242

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

AFCMR 1993.

Accused claiming ineffective assistance of counsel failed to prove that military counsel misadvised him during administrative separation action, refused to request mental evaluation of accused to pursue marijuana addiction defense, and failed to adequately prepare for trial. U.S.C.A. Const.Amend. 6.

20. MILITARY JUSTICE k1242

258A —

258AVII Trial
258Ak1238 Defense Counsel
258Ak1242 Effective assistance of counsel; multiple representation.

[See headnote text below]

20. MILITARY JUSTICE k1244

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1244 Post-trial duties.

AFCMR 1993.

Accused failed to establish he was denied effective assistance of counsel during posttrial representation by military counsel's failure to consult with him and refusal to advocate all errors accused believed occurred at trail. U.S.C.A. Const.Amend. 6.

21. MILITARY JUSTICE k1244

258A —
258AVII Trial
258Ak1238 Defense Counsel
258Ak1244 Post-trial duties.

AFCMR 1993.

Accused was not denied effective assistance of counsel during posttrial representation by military counsel's requesting, as alternative to rehearing on sentence, clemency in form of approval of bad-conduct discharge and substantial reduction in confinement forfeitures; although it was error for counsel to request relief including bad-conduct discharge without accused's consent, accused was not prejudiced. U.S.C.A. Const.Amend. 6.

22. MILITARY JUSTICE k1392

258A	—
258AX	Review of Courts-Martial
258AX(A)	Initial Action on Record
258Ak1385	Staff Judge Advocate or Legal Officer's Review
258Ak1392	Incorrect or misleading advice, opinion, or statement.

AFCMR 1993.

Convening authority received complete and accurate advice on proper standard he was to apply to sentence; even if staff judge advocate's original review was unclear, it was crystallized by posttrial counsel's response to review advocation rehearing on sentence, and staff judge advocate's addendum thereto.

23. MILITARY JUSTICE k1395.1

258A	—
258AX	Review of Courts-Martial
258AX(A)	Initial Action on Record
258Ak1395	Determination or Relief; Approval; Matters Considered
258Ak1395.1	In general.

AFCMR 1993.

It did not appear that convening authority could have meaningfully determined what sentence would have been judged in absence of disobedience offense after findings thereof were disapproved, especially in view of fact previous offense accounted for two thirds of authorized maximum punishment at trail.

24. MILITARY JUSTICE k1415

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1414	Preservation of Grounds of Review; Waiver; Plain Error
258Ak1415	Admission or exclusion of evidence.

AFCMR 1993.

Admission of accused's letter to the Secretary of Air Force, detailing accused's drug use, was not plain error; accused who disregarded advice of counsel during administrative discharge action and at other times could not be heard now to complain regarding the consequences. Military Rules of Evid., Rule 305.

25. MILITARY JUSTICE k1433

258A	—
258AX	Review of Courts-Martial
258AX(B)	Further Review
258AX(B)1	In General
258Ak1430	Appellate Disposition
258Ak1433	Reassessment to cure error.

AFCMR 1993.

On appeal, accused's sentence for divers use of marijuana would be reassessed, to reflect disapproval of findings on willful disobedience offense, only to provide for bad-conduct discharge and reduction to E–1, considering difficulty in determining exact length of confinement and forfeitures that would be appropriate, and that accused already served whatever confinement was appropriate.

*1105 Appellate Counsel for the Appellant: Captain David D. Jividen (argued), Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, and Major Mary C. Yastishock.

Appellate Counsel for the United States: Captain Carlos L. McDade (argued), Lieutenant Colonel Brenda J. Hollis, and Major Paul H. Blackwell, Jr.

Before O'HAIR, SNYDER, and GRUNICK, Appellate Military Judges.

OPINION OF THE COURT

SNYDER, Judge:

Is an accused denied his Sixth Amendment right to counsel when the trial judge denies a request for a continuance and informs the accused he must either proceed with duly detailed and individual military counsel or proceed pro se? Under the facts and circumstances of the instant case, we hold he is not.

Contrary to his pleas, appellant was convicted by a general court-martial, which included enlisted members, of willful disobedience of a superior commissioned officer and divers uses of marijuana. (FN1) He was sentenced to a bad-conduct discharge, confinement for one year, forfeiture of $500 pay per month for 6 months, and reduction to E–1. The convening authority disapproved the findings on the willful disobedience offense, dismissed that charge and specification, and reduced the confinement portion of the sentence to 10 months. The remaining parts of the sentence were approved.

Appellant raises 13 assignments of error. Two have some merit, and we grant appellant partial relief.

I. SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL

Appellant avers the trial judge abused his discretion to appellant's prejudice by denying his request for a delay,

thereby forcing appellant to proceed pro se against his wishes. We disagree.

A. Factual Background

Charges were preferred against appellant on 27 August 1990. Captain W already was appellant's individual military *1106 counsel for an administrative proceeding. (FN2) After the Article 32 Investigation, the charges were referred for trial on 20 September 1990 and served on appellant on 25 September 1990. Trial was scheduled for 2 October 1990. Because of Captain W's illness and medical treatment, delays were granted until 30 October 1990. On 26 October 1990, however, appellant retained civilian counsel, and, on 1 November 1990, the trial judge granted civilian counsel's request for delay until 3 December 1990. Between 3 December 1990 and 15 January 1991, additional delays were granted at the request of civilian counsel. Because of his involvement with a capital murder trial, civilian counsel did not meet again with appellant until 18 December 1990, when he reviewed the entire case with appellant and Captain W.

After thoroughly reviewing the case and the trial strategy Captain W proposed to pursue in defense of appellant, civilian counsel opined appellant was in extremely capable hands with Captain W. and civilian counsel could not offer any better representation than Captain W was already providing. Consequently, civilian counsel advised appellant that, in view of Captain W's apparent ability and thorough preparation, he could not, in good conscience, accept appellant's retainer and recommended he proceed solely with Captain W's representation. On 19 December 1990, appellant provided a letter informing all concerned that he had released civilian counsel and was fully satisfied Captain W would adequately represent him.

Trial convened on 15 January 1991. After the trial judge advised appellant of his rights regarding counsel, *see* R.C.M. 901(d)(4), appellant informed the trial judge he had released both his detailed and individual military counsel. This part of the colloquy was as follows:

MJ: Since you are here today with Captains [R] and [W], am I correct in assuming that you wish to proceed to trial represented by them alone?

Acc: No sir, I do not. I wish to release them at this time.

MJ: And do what? Represent yourself?

Acc: Yes, sir. I'd like to submit this to you sir.

MJ: Okay, I'll mark this as Appellate Exhibit 1. (FN3)

Acc: Sir, may I clarify something?

MJ: Sure.

Acc: I do not wish to represent myself. *I request that a civilian attorney be assigned,* and I request a six to eight week delay to prepare. (emphasis added)

* * * * * *

MJ: I have given you three and a half, over three and a half, almost four months to get civilian counsel. You fired a civilian counsel. You tell me you are satisfied with your military lawyer, and then you come in today and you want a civilian counsel. The answer to that is no. Now, do you want a military counsel?

Acc: No sir, I do not at this time.

MJ: Okay, do you want to represent yourself?

Acc: No sir, I do not.

MJ: Well, what are you going to do? What are you going to do, because I have given you delay after delay, to have *1107 a civilian counsel present. You fired him, you notified me that

you fired him, that you are satisfied with your military counsel, and then you come in here today and tell me that you want a civilian counsel. I'm telling you the answer to that is no. Now, do you want a military counsel?

Acc: No sir, I do not.

* * * * * *

MJ: Sergeant **Dresen,** what I am going to do is I'm going to have [counsel] remain at counsel's table throughout the trial. Now you are representing yourself, you don't have to consult them if you don't want to, but they are there to provide you legal advice if you feel that you need it. Do you understand that?

Acc: Yes, sir. I request that they not sit at the table though.

MJ: Well, I'll leave them there and you don't have to ask them anything if you don't want, but that's where they are going to be.

Acc: Sir, I don't want to give the jury the impression that I have someone here representing me.

MJ: Well I'm not going to tell them that they are representing you. I am going to tell them that you are representing yourself, and that they are there to provide you legal advice if you request it. (FN4)

B. Denial of Continuance and *Pro Se*

[1][2] Upon request and for reasonable cause, the military judge is authorized to grant requests by either party for a continuance as often as fairness may dictate. Article 40, UCMJ, 10 U.S.C. Sec. 840 (1988). A request for a continuance is addressed to the sound discretion of the trial judge, and only a clear abuse of that discretion will result in error. *United States v. Thomas,* 22 M.J. 57 (C.M.A.1986); *United States v. Menoken,* 14 M.J. 10 (C.M.A.1982). The

discretion granted trial judges in deciding the question of continuances is very broad, and only "a myopic insistence upon expeditiousness in the face of a justifiable need for delay," which must be determined case-by-case, will constitute an abuse of discretion. *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964), *accord Morris v. Slappy,* 461 U.S. 1, 11–12, 103 S.Ct. 1610, 1616–17, 75 L.Ed.2d 610 (1983); Thomas, 22 M.J. at 59.

[3][4] Some of the factors weighed in testing for an abuse of discretion are: the number of prior delays granted, the timeliness and stage in the proceedings the continuance was requested, and, if based on dissatisfaction with counsel, the adequacy of the trial court's inquiry into appellant's complaint against counsel. *See United States v. Torres,* 793 F.2d 436 (1st Cir.1986), *cert. denied,* 479 U.S. 889, 107 S.Ct. 287, 93 L.Ed.2d 262 (1986); *United States v. Stevens,* 27 M.J. 626 (A.F.C.M.R.1988), *aff'd,* 28 M.J. 159 (C.M.A.1989), *cert. denied,* 490 U.S. 1091, 109 S.Ct. 2433, 104 L.Ed.2d 989 (1989). Reviewing and weighing these particular factors, and applying them to the instant case, we find no abuse of discretion.

[5][6][7] Although Article 38(b), UCMJ, 10 U.S.C. Sec. 838(b) (1988), guarantees an accused the right to obtain civilian counsel at any point of the trial, it does not guarantee an accused a delay in the progress of the trial for him to do so.

> An accused can always discharge his attorney, but if he desires to substitute another attorney for the one discharged, his right is qualified in "that the request for substitution of counsel cannot impede or unreasonably delay the proceedings."

United States v. Montoya, 13 M.J. 268, 274, *quoting United States v. Jordan,* 22 U.S.C.M.A. 164, 166, 46 C.M.R. 164, 166 (1973). This principle reflects the fact that, unlike the Sixth Amendment right to the assistance of counsel, the

right to counsel of one's choice is not absolute, and must be balanced against society's interest in the efficient and expeditious administration of justice. Thomas, 22 M.J. at 59, and cases *1108 cited therein. (FN5) Further, the Sixth Amendment right to counsel may not be manipulated for purposes of delay or to thwart the ends of justice. *United States v. Flewitt,* 874 F.2d 669 (9th Cir.1989); *McMahon v. Fulcomer,* 821 F.2d 934 (3d Cir.1987).

In the instant case, appellant's request for a continuance the day of trial truly was an eleventh hour request. Granted, the delays due to Captain W's illness and civilian counsel's docket were not his fault, but appellant still had more than ample time between 29 December 1990, when he released civilian counsel, and 15 January 1991 to find another civilian counsel. The record not only supports the conclusion appellant did nothing between 29 December 1990 and 15 January 1991 to obtain civilian counsel, but also that he had no realistic expectation of obtaining another counsel. This fact is demonstrated by appellant's request for the trial judge to *appoint* a civilian counsel, (FN6) as well as the following exchange:

> MJ: Yesterday you told me you needed a delay and made a motion to have civilian counsel provided to you at government expense because you didn't have the money, and then you wanted a delay to hire a civilian counsel, and now you do have the money and want a delay. Let me ask you this. If I gave you a delay to get a civilian counsel, what would you do with that delay? ... How would you have a civilian attorney present your case?
>
> Acc: Basically the same way I am going about it now; command influence. Hopefully I could find an attorney that would take it on a contingency basis, because my intentions are to file a civil suit when this matter is concluded.

Further, the trial judge ascertained appellant's military counsel were fully prepared, there was no evidence of an irreconcilable conflict between appellant and his counsel, and, when appellant informed them he no longer desired their services, counsel were willing to proceed in the manner appellant desired.

When appellant stated he desired a six to eight week delay to "prepare and obtain witnesses," the trial judge walked appellant through the issues he proposed to raise and the witnesses he requested and their desired testimony. This inquiry went to the heart of appellant's request for the additional delay. On the basis of appellant's responses, the trial judge properly ruled the issues and preferred testimony irrelevant to the proceedings.

In view of the prior delays granted appellant, his waiting until the morning of the trial to discharge his fully prepared, military counsel, his unrealistic request for civilian counsel, and his baseless request for additional delay, the trial judge had more than a reasonable basis on which to conclude appellant's request was made solely for purposes of delay. (FN7)

The record reflects the trial judge was not indifferent to appellant's requests falling within reasonable bounds. When appellant complained of insufficient sleep due to his preparation for the trial's sessions, the trial judge adjourned earlier than normal and started later the next day. Further, *1109 after the start of trial, the trial judge continued the proceedings for five days to allow appellant to arrange for witnesses on relevant issues and prepare his presentation. Therefore, the trial judge was reasonably within his discretion in denying appellant the six to eight week continuance. The trial judge's ruling was not an unreasonable insistence on expeditiousness, but was based on the history of the case and the merits of the request. *United States v. Browers,* 20 M.J.

356, 361 (C.M.A.1985) (Cox, J., concurring); Stevens, 27 M.J. at 627.

[8] Although appellant informed the trial judge he did not desire to represent himself, his actions inescapably produced that result. After ascertaining whether an accused is seeking to discharge an unprepared counsel, or, for personal reasons, seeking to discharge counsel who is fully prepared, *McMahon v. Fulcomer,* 821 F.2d 934, there comes a point when the court can require an accused to proceed with detailed counsel or proceed *pro se. United States v. Flewitt,* 874 F.2d at 674; *United States v. Moya-Gomez,* 860 F.2d 706 (7th Cir.1988), *cert. denied,* 492 U.S. 908 (1989). Therefore, regardless of appellant's desires and protestations, when, in the face of the trial judge's clear warning that substitute civilian counsel would not be produced at government expense, appellant insisted on discharging his detailed and individual military counsel for insufficient cause, he in fact waived the assistance of those counsel and his action was the functional equivalent of a *knowing and voluntary* choice to proceed *pro se. McQueen v. Blackburn,* 755 F.2d 1174, 1178 (5th Cir.1985), *cert. denied,* 474 U.S. 852, 106 S.Ct. 152, 88 L.Ed.2d 125 (1985). The only question to address with regards to this choice is whether appellant was adequately apprised of the risks to which his choice exposed him.

C. Adequacy of *Faretta* (FN8) Advice

[9] Prior to allowing an accused to waive representation by counsel and proceed pro se, the trial judge must make the accused aware of the disadvantages of self-representation and find the accused understands the risks and disadvantages of self-representation and that the accused's waiver of counsel is knowing and voluntary. *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); R.C.M. 506(d). Appellant argues the trial judge failed to make a particularized

finding that he clearly understood the disadvantages of self-representation and that appellant was mentally competent to make the decision. In fact, appellant argues the trial judge was required to make a two-tiered finding of mental competency: that he was competent to stand trial, and he also possessed a higher degree of mental competency required to proceed pro se. We disagree with these assertions.

[10] We first address appellant's assertion that the degree of mental competency required for knowingly proceeding pro se is higher than that of basic mental competency to stand trial. This argument is based on *United States v. Freeman,* 28 M.J. 789 (N.M.C.M.R.1989), which appears to hold that competence to merely assist in one's defense with representation of counsel is not sufficient to demonstrate competence to proceed *pro se*. The Navy Court decided, essentially, that the higher degree of competence is shown by insuring an accused possesses the legal ability to represent him/herself in addition to understanding the risks of self-representation. *Freeman,* 28 M.J. at 792–3, 793 n. 5. We do not read *Faretta,* R.C.M. 506(d), or *United States v. Streater,* 32 M.J. 337, as requiring such a dual standard of competency.

We join our Army brethren in holding R.C.M. 506(d) provides the sole test for determining whether an accused is competent to proceed *pro se,* and that the standard is not higher than the one required for conducting or assisting in one's defense. *See United States v. Mix,* 32 M.J. 974, 980 (A.C.M.R.I991). We also believe the Court of Military Appeals does not subscribe to a higher degree of competency for a knowing decision to proceed *pro se. See Streater.* ***1110** 32 M.J. at 339 n. 3. As did the Army Court, we also view Freeman as reflecting a record where there was a reasonable doubt regarding Freeman's mental responsibility, period, let alone his competency to represent himself. Mix, 32 M.J. at 980 n. 4.

R.C.M. 506(d) reads as follows:

> (d) Waiver. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waived counsel and conducts the defense personally. . . .

[11][12] The trial judge discussed the risks of self-representation with appellant on three occasions. (FN9) He ascertained appellant's education level, the length of his military service, and he particularized the risks and difficulty appellant could encounter, e.g., inartful examination of witnesses and being held to the same standard as an attorney. Although the trial judge did not particularize the basis for his finding, he did make a finding as to appellant's understanding his choices and making a knowing waiver. His ruling was as follows:

> I am going to continue to allow you to represent yourself. I don't think it's a good idea, but you have that constitutional right. Captain [W] will be here to help you if you want. You don't have to ask him for advice if you don't want to. Although I don't think your choice is intelligently made, I think it is knowing and voluntarily made. So I am going to grant your request to represent yourself.

First, we do not view the trial judge's comment on the intelligence of appellant's choice as inconsistent with his findings, but as a comment on the wisdom of appellant's

choice. Appellant asserted the need for another mental evaluation, but the trial judge ruled another one was unnecessary. In refusing appellant's request, the trial judge relied on his in-court observations, as well as an earlier mental evaluation finding appellant mentally competent. All of the evidence before the trial judge reflected a diagnosis of chemical dependency, which is not a mental disease or defect. (FN10) Further, our review of the record also convinces us the trial judge had sufficient information to enter informed findings.

It was error for the trial judge not to particularize the basis for his findings, but it was not prejudicial error. Streater, 32 M.J. at 339. Our review of the record convinces us appellant was mentally competent and made a knowing, intelligent choice to proceed *pro se*. As we held in subpart B. *supra*. when appellant discharged his military counsel, he made a knowing waiver of counsel. In addition to trying to avoid trial, appellant was adamant on how he wanted his case handled and proceeded to do so. Single minded pursuit of an ill-advised strategy does not equate to mental incompetence.

The record demonstrates appellant was aware of and appreciated the risks of self-representation, which is reflected by his persistent request for an alternative delay of five days to prepare, which the trial judge did eventually grant. (FN11) The record *1111 also demonstrates appellant pursued a coherent, albeit ill-advised, strategy. He litigated his assertion of command influence, vindictive prosecution based on alleged bias.by the office of the staff judge advocate, and reprisal for his filing Inspector General complaints addressing defective showers in the dormitories. He presented evidence of his military character, as well as attacking the credibility of a witness called to corroborate appellant's prior admission.

Most important, however, the record demonstrates compellingly that the trial judge did not abandon appellant.

On numerous occasions, out of the presence of the members, the trial judge cautioned appellant he was pursuing a path which would provide evidence of his guilt and he might want to reconsider. Appellant basically thanked the trial judge for his advice and pressed on. We view this as additional evidence of appellant knowingly proceeding with full knowledge of the risks.

D. Requiring Counsel's Presence At Counsel's Table

[13] Appellant also claims prejudice from the trial judge's requiring Captain W to remain at counsel's table over appellant's objection. We find no error. The trial judge provided a clear instruction to the court members regarding Captain W's role at the trial. His instruction, and Captain W's presence, in no way infringed on the perception appellant was representing himself. *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). In view of the fact the record reflects appellant consulted Captain W during the trial, we fail to discern any prejudice.

[14][15] We find no impropriety in the trial judge asking Captain W how much time and effort he expended preparing to defend appellant. These were questions Captain W was obliged to answer as an officer of the court. (FN12) On the other hand, the trial judge did err when he asked Captain W if a particular unit was assigned to his home base, Dyess AFB, Texas, while ruling on the admissibility of a document. Captain W's answer was used to exclude the document from evidence. However, we find no prejudice. The document related to a collateral matter of minor importance. The remaining inquiries by the trial judge were to insure appellant possessed the documentation he claimed he needed to litigate his motions and pursue his defense.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

[16][17][18] Appellant claims he was prejudiced by deficient performance of his defense counsel both during and after trial. To successfully claim ineffective assistance of counsel, appellant must demonstrate deficient performance or errors by counsel, and also demonstrate that he was prejudiced as a result of the claimed errors. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden is on appellant to demonstrate the errors and the claimed prejudiced. Because of the many decisions which must be made during a trial, the latitude accorded counsel is wide, and tactical decisions will not be second guessed on appeal. *Strickland* at 688–91, 104 S.Ct. at 2065–66. *Lockhart v. Fretwell,* — U.S. —, 113 S.Ct. 838, 122 L.Ed.2d 180 (1992); *United States v. Scott,* 24 M.J. 186 (C.M.A.1987).

A. At Trial

[19] Appellant's complaints against Captain W are: misadvice during the administrative separation action, refusal to *1112 request another mental evaluation of appellant in order to pursue the marijuana addiction defense, and failure to adequately prepare for the trial. Appellant claims Captain W advised him to prepare a statement for use in the discharge action which detailed appellant's drug use and for appellant to submit it to the legal office after it was complete. Appellant asserts he followed this advice to his serious detriment, for this statement was the prosecution's main evidence at trial.

Captain W agrees he advised appellant to draft a statement for submission to the Secretary of The Air Force, (FN13) but he told appellant to first submit it to him for review and editing. Captain W states he had no knowledge appellant had submitted the statement to the legal office until after the legal office phoned and advised him of receiving it.

Captain W testified on appellant's motion that he thoroughly investigated the possibility of bias by the office of the staff judge advocate, and concluded there was no bias against appellant. As he stated at trial, Captain W states in his affidavit that he was fully prepared for trial. He states he researched and discussed with appellant the addiction defense, advised against it, and appellant agreed to follow an alternative strategy. Captain W relates that, the morning the trial was to begin, appellant informed him and Captain R appellant was releasing them to delay the trial until he reached 20 years of service. Appellant disputes Captain W's affidavit.

After reviewing the record and the affidavits, we resolve the factual issues against appellant. The record demonstrates Captain W was commendably prepared. The civilian counsel's affidavit is additional evidence of Captain W's preparation. Captain W requested the assistance of Captain R solely with drafting the anticipated motions. Captain W had already performed the research and defined the nature of the motions. Appellant's actions during trial, where he consistently refused to heed prudent advice and cautions, tend to corroborate Captain W's statement that he advised appellant to first submit his statement to him for review and editing, but appellant disregarded his advice.

We also resolve against appellant his claim that Captain W refused to pursue a mental evaluation and the defense of addiction to marijuana. Attached to Captain W's affidavit is a copy of a chart outlining the advice given to appellant and the strategy and tactics to be pursued at trial. Captain W used the chart as he consulted with appellant in detail concerning his trial and defense. Appellant's initials appear by each issue and right discussed. Consequently, we accept Captain W's assertions that he did not refuse to pursue a defense appellant desired and that appellant concurred with and consented to the strategy to be pursued at trial. It was appellant's conscious

choice which led him to pursue his addiction defense pro se, and not deficient performance by Captain W. his individual military counsel.

B. Post-Trial Representation

[20][21] Captain N was detailed to represent appellant during the post-trial stage of his proceedings. Appellant's complaint against Captain N is multipronged: her refusal to personally consult with him at the confinement facility or return his telephone calls, and her refusal to advocate the errors he believed occurred at his trial. Appellant alleges Captain N refused to seek disapproval of his bad-conduct discharge, informing him the convening authority did not have the authority to overturn or disapprove the punitive discharge, and that Captain N refused to assist him with seeking rehabilitation and retention.

Captain N confirms she declined appellant's request to consult with him at the confinement facility. She did not do so because of her busy schedule with other clients and because it was her professional opinion there were no extraordinary circumstances requiring a personal visit. She *1113 states there was no difficulty reaching appellant by phone, and she did return appellant's calls. Captain N also details other differences with appellant.

Captain N denies telling appellant the convening authority could not disapprove the bad-conduct discharge. She told him she viewed that as unlikely. She also states it was not a matter of her refusing to assist appellant with preparing requests for retention and rehabilitation, but appellant's refusal to accept her advice on all of the matters she raised. Further, after she refused to prepare the presentation the way appellant demanded, which in her view contained inflammatory material harmful to his receiving meaningful relief, appellant refused to discuss alternative plans with her.

She also states she advised appellant she would not address every conceivable legal issue, for those issues were already preserved for appeal. She viewed the best strategy to be a request for a rehearing on sentence and seeking meaningful sentence relief. Captain N also states appellant, against her request and advice, submitted matters directly to the convening authority without first allowing her to review them. She also states appellant refused to allow her to see what he had submitted. Captain N opposed seeking a delay solely so appellant could continue to draw E–6 pay as long as possible. However, without her knowledge, appellant requested, and received, a longer delay than she required to complete her submissions on his behalf. Captain N states she advised appellant it was in his best interest to ask for reasonable relief which the convening authority might grant.

As is apparent, Captain N had experiences with appellant similar to those encountered by his trial defense counsel. We resolve the factual differences in her favor. However, that does not dispose of this issue. Captain N submitted a thorough and well reasoned brief on appellant's behalf, wherein she vigorously advocated a rehearing on sentence. Unfortunately, we conclude Captain N committed error via the alternative relief she sought from the convening authority.

As an alternative to a rehearing on sentence, Captain N requested clemency in the form of an *approval of the bad-conduct discharge* and a substantial reduction in the confinement and forfeitures. Of all the possible court-martial punishments, the bad-conduct discharge was the one thing appellant did not desire. Although Captain N probably was entirely correct in viewing it as unlikely the convening authority would disapprove the bad-conduct discharge, it was error under the circumstances of this case to specifically request relief which included the bad-conduct discharge *without appellant's consent.* Captain N's affidavit implies this

course was pursued on the basis of professionally assessed reality, as opposed to appellant's consent. It detracted from otherwise excellent advocacy for appellant. This was not a case of urging the convening authority to reduce a dishonorable discharge to a bad-conduct discharge. Only a bad-conduct discharge was in issue, and it concerned a 19-year noncommissioned officer facing loss of any chance at retirement. To pursue this strategy, Captain N should have insured appellant knowingly consented to it.

Although we find error by Captain N. we do not find prejudice to appellant. The specific basis for our finding no error will be detailed in our final disposition. Therefore, appellant has not satisfied the second prong of the *Strickland v. Washington* test.

III. IMPROPER ADVICE TO CONVENING AUTHORITY

[22] [23] Appellant also avers the staff judge advocate failed to inform the convening authority of the proper standard to apply to the sentence. Specifically, after advising the convening authority to disapprove the findings on Charge I and its specification and dismiss the charge, the staff judge advocate failed to clearly advise the convening authority of the following: that the convening authority must first appropriately reassess the sentence to account for the change in the findings, and then make a separate determination of sentence ***1114** appropriateness based on the reassessed sentence. Further, appellant avers the convening authority was not made aware that first he must decide whether he could determine the sentence the court would have adjudged solely for the remaining charge. *See United States v. Reed,* 33 M.J. 98 (C.M.A. 1991).

Appellant raises this error as an alternative to his argument that only a rehearing on sentence can truly provide him a proper sentence for the sole offense remaining after the

dismissal of Charge I and its specification. The basis for this argument is that Charge I was the means by which extremely prejudicial evidence was admissible against appellant, and it is extremely difficult, if not impossible, to determine what sentence the members would have adjudged in its absence. In the alternative, he requests another Recommendation by a staff judge advocate and another action by the convening authority. We partially agree with appellant.

First, we do not agree that the convening authority received incomplete or inaccurate advice on the proper standard he was to apply. Even if the staff judge advocate's original review was unclear, it was crystallized by Captain N's R.C.M. 1106(f) response to the review advocating a rehearing on sentence because the two assessments could not be done reliably, and the staff judge advocate's addendum thereto. We believe the convening authority was clearly aware of the standards to be applied regarding reassessment to cure error and sentence appropriateness. *Cf. United States v. Hill*, 27 M.J. 293 (C.M.A.1988).

Our discomfort is with whether the convening authority could meaningfully determine what sentence would have been adjudged in the absence of the disobedience offense. This is especially so in view of the fact the disobedience offense accounted for two-thirds of the authorized maximum punishment at trial. *See Reed*, 33 M.J. at 99; *United States v. Sales*, 22 M.J. 305 (C.M.A.1986). Further, although the staff judge advocate defined the two functions the convening authority had to perform, he did not state the basis for determining 10 months confinement would have been adjudged in the absence of the disobedience offense. *Reed*, 33 M.J. at 100. Nonetheless, at this stage of the proceedings, we do not believe a rehearing on sentence will be necessary to correct the situation. We will do so in our final disposition.

IV. REMAINING ASSIGNMENTS OF ERROR

[24] It was not plain error to admit appellant's letter to the Secretary of The Air Force. As indicated in Part II, above, we find factually that appellant disregarded the advice of his counsel during the administrative discharge action as well as at other times. He cannot now be heard to complain regarding the consequences. The trial judge properly admitted the letter detailing appellant's drug usage. Mil.R.Evid. 305. The issue regarding fixed terms of trial and appellate judges has been decided adversely to appellant. *United States v. Graf,* 35 M.J. 450 (C.M.A.1992). Any issue regarding trial counsel's argument on sentence is mooted by our disposition. We have considered the remaining assignments of error and find them without merit.

V. SENTENCE REASSESSMENT

[25] Because of the unique circumstances of this case, we do not consider it in the best interests of justice to remand for a rehearing on sentence. We are confident our action will provide appellant with a sentence no more severe than he would have received at trial had the disobedience offense not been present or in the event of his acquittal thereof. *United States v. Peoples,* 29 M.J. 426 (1990).

At trial, appellant never wavered regarding his views on his use of marijuana. In fact, his adamant views on marijuana were the source of inevitable tension between him and his counsel. Appellant averred to the court that he used marijuana as a sedative to relax and ease the tension of his marriage to an alcoholic spouse. By time of trial, of course, he no longer was married. His justification to the members was that his use of marijuana did not interfere with the performance of his duties. Applying our experience gained as Air Force officers as well as trial and appellate *1115. judges on similar cases, we are convinced the court members rejected this rationale.

Further, we are also convinced they viewed appellant's misconduct as aggravated by the testimony that appellant's clothing smelled of marijuana during duty hours.

Because appellant was convicted of divers uses of marijuana, combined with evidence of use during duty hours and his noncommissioned officer status, we are confident confinement would have been adjudged. The problem is determining how much. However, regardless how much confinement the court members would have adjudged, appellant already has served the confinement. Thus, even if we could accurately determine the lesser amount, assuming it to be lesser, we cannot make appellant whole in that regard. We can, however, adjudge a sentence which does not include confinement or forfeitures, and will fall below the ceiling of the entire sentence we are confident the court members would have adjudged. *Peoples,* 29 M.J. at 428.

Consequently, we believe the only portions of appellant's sentence which are difficult to determine are the exact length of the confinement and forfeitures. Nonetheless, we are confident appellant's sentence would have included, as a minimum, a bad-conduct discharge and reduction. *Peoples,* 29 M.J. at 429; *Sales,* 22 M.J. at 307.

Accordingly, reassessing the sentence on the above basis, we approve only so much of the sentence as provides for a bad–conduct discharge and reduction to E–l. Article 59(a), UCMJ, 10 U.S.C. Sec. 859 (a) (1988). The sentence, as reassessed, is fully appropriate. Article 66(c), UCMJ, 10 U.S.C. Sec. 866(c) (1988).

VI. DECRETAL

The findings and the sentence, as reassessed, are correct in law and fact and are hereby,

AFFIRMED.

Senior Judge O'HAIR and Judge GRUNICK concur.

FN1. In violation of Articles 90 and 112a, UCMJ, 10 USC Secs. 890 and 912a (1988).

FN2. As a result of a command directed urinalysis which tested positive for marijuana, appellant was the subject of an administrative discharge action. *See* Air Force Regulation (AFR) 39–10, *Administrative Separation of Airmen,* Chap. 5, pare. 5–50.1 (Apr 1988). Captain F initially represented appellant on that matter, but appellant released him and requested Captain W. The Secretary of The Air Force denied appellant's request for lengthy service probation and rehabilitation and directed his discharge. Before the execution of his discharge, however, appellant was selected for a base-wide random urinalysis inspection. His sample tested positive for marijuana, resulting in this court-martial.

FN3. In Appellate Exhibit I appellant sets forth his dissatisfaction with all counsel who had represented him to that point, and specifies his constitutional rights he believed had been violated. He also stated Captain W was the best counsel he had, but was still dissatisfied with him. Appellant's basic complaint was that counsel refused to present his defense in the manner which he desired. Counsel dispute this contention. They viewed his strategy as ill-advised, but denied they refused to present his desired defense.

FN4. The trial proceeded with only Captain W present. Because of appellant's criticism of him, the second detailed counsel, Captain R. believed it improper for him to continue. Upon his request, the trial judge excused him from further participation.

FN5. Appellant argues correctly that a military accused's right to counsel is broader in certain respects than those under the Fifth and Fourteenth Amendments applicable to civilian accused. *See United States v. Gnibus,* 21 M.J. 1 (C.M.A.1985). However, the specific extra breadth exists primarily in the inapplicability of indigency to the military right to counsel and the degree which the attorney-client relationship, once formed, is protected. Gnibus, 21 M.J. at 6. Further, the right to named counsel under Article 38(b), UCMJ, 10 U.S.C. Sec. 838(b) (1988) is not absolute, and there is no right to civilian counsel at government expense.

FN6. Appellant asserted that, due to unlawful command influence at Carswell Air Force Base, Texas, he could not trust any military defense counsel to represent him and present the defense he desired to present. Because of Air Force defense counsel's separate chain of command, this premise rapidly collapses under its own weight. See AFR 111–1, *Military Justice Guide.* Chap. 18 (Sep 1988).

FN7. At the time of trial, appellant had over 19 years of service. One of the trial judge's essential findings is appellant was seeking delay of his trial to reach 20 years service, when he would be retirement eligible. In an affidavit responding to appellant's claim of ineffective representation, Captain W states appellant informed him and Captain R he was discharging them so he could reach the 20 year point.

*1115–FN8. *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

FN9. After beginning the Faretta inquiry, the trial judge became distracted by appellant's requests for delay and sorting through them. However, it is far preferable for trial judges to remain focused on the issue at hand before

resuming or moving on to another. This is the only detraction from an otherwise commendable handling of a case tried under difficult circumstances.

FN10. The trial judge also allowed appellant to seek another mental evaluation during the trial, ordered trial counsel to assist him in obtaining an appointment, and ordered the examination to be conducted pursuant to R.C.M. 706(c)(3). There was no evidence forthcoming to indicate appellant was other than chemically dependent on marijuana.

FN11. Appellant tried to use that very risk to his advantage, as represented by the following:

> Acc: I think there's a question of my psychiatric disposition at this time. For proof of that, I am standing here in a general court-martial defending myself.
>
> MJ: I agree with you that is not very smart. But that alone does not raise insanity. I've been down this road with you before. I agree your decision to go represented by yourself has not been a smart one, but that's your constitutional right. But that doesn't raise insanity or incompetence to stand trial.

Additional exchanges in the record reflect appellant explaining his assertion of mental incompetence to mean he was unprepared to pursue his motions and defense, not that he was unable to comprehend the proceedings and meaningfully participate.

FN12. This questioning occurred after appellant had called Captain W as a witness on part of his vindictive prosecution motion. Although the trial judge fully warned appellant he was making Captain W available for cross-examination by doing so, the trial judge excused Captain W from the witness stand without tendering him

for cross-examination. We do not believe that was by happenstance, but was done to preclude divulgence of otherwise confidential communications.

FN13. Because of the assessed strength of the Government's case, including potential rebuttal evidence, and appellant's 19 years of service, Captain W advised appellant to waive a board hearing and request lengthy service consideration. *See* AFR 39–10, para. 6–35. If granted, this would have placed appellant on probation and allowed him to reach retirement eligibility.